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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

DEVIN DANIELS, BRYCE CLEMENTS, DAIMON FULLERTON, NICOLE MURROW, AND MAREN SANDLER, CLASS REPRESENTATIVES,

Petitioners,

v.

PHILIP MORRIS USA, INC., R.J. REYNOLDS TOBACCO CO., LORILLARD TOBACCO CO., AND BROWN & WILLIAMSON TOBACCO CORP.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1334(b), preempts a claim that respondents engaged in unfair competition under California Bus. & Prof. Code 17200, by purposefully targeting persons under 18 years old in the marketing and advertising of cigarettes, thereby inducing and profiting from transactions that are prohibited under California law?

2. Whether (a) commercial advertising that is intentionally designed to encourage minors to obtain cigarettes is entitled to protection under the First Amendment, so long as its audience does not exclusively consist of minors and, if it is, (b) whether the California Supreme Court's conclusion -- that providing a civil remedy against those who actively induce and profit from unlawful cigarette sales is unconstitutional -- can be squared with this Court's exposition of the "narrow tailoring" prong of the *Central Hudson* test?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs in Superior Court for San Diego County and appellants in the California Supreme Court, are Devin Daniels, Bryce Clements, Daimon Fullerton, Nicole Morrow, and Maren Sandler, as class representatives of a class certified in the Superior Court as "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994 and December 31, 1999."

Respondents, who were defendants in Superior Court and respondents in the California Supreme Court, are Philip Morris USA Incorporated, R.J. Reynolds Tobacco Company, Lorillard Tobacco Company and Brown and Williamson Tobacco Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AURTHORITIES v
OPIONION BELOW 1
JURISDICTION 1
STATUTES 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 12

I. THE CALIFORNIA SUPREME COURT'S PREEMPTION RULING CONFLICTS WITH THIS COURT'S DECISIONS 15

A. The Court Misread *Lorillard* to Alter *Cipollone*'s Predicate Legal Duty Test 15

B. As in *Bates*, the State Law Duty Here Parallels theRequirements of Federal Law 20

C. *Lorillard* Does Not Divest States of Authority Over Advertising Intended to Induce Unlawful Cigarette Purchases 23

D. The FCLAA Reflects No Intent to Shield from State Law the Intentional Targeting of Minors in Cigarette Advertising 27

II. THE COURT'S READING OF THE FIRST AMENDMENT CONFLICTS WITH THIS COURT'S CONTROLLING PRECEDENT 28

A. Tobacco Companies Do Not Have a First Amendment Right to Market Cigarettes to Children 30

B. The Decision Rests On A Fundamental Misunderstanding of the Final *Central Hudson* Prong 35

III. THE CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S REVIEW 39

CONCLUSION 41

TABLE OF AUTHORITIES

Cases:

Barquis v. Merchants Collection Ass□n,
496 P.2d 817 (Cal. 1972) 16

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 20,21

Board of Trustees, SUNY v. Fox,
492 U.S. 469 (1989) 37

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977) 24

Cel-Tech Communications, Inc. v. Los Angeles .....
Cellular Telephone Co., 20 Cal. 4th 163 (1999)... 6,16

Central Hudson Gas & Elec. Corp. v. Public Serv.
Comm'n, 447 U.S. 557 (1980)..... passim

Cipollone v. Liggett Group Inc.,
505 U.S. 504 (1992)..... passim

FTC v. Sperry & Hutchinson Co., 405 U.S. 233
(1972)..... passim

Gerrity v. R.J. Reynolds Tobacco Co.,
399 F. Supp. 2d 87 (D. Conn. 2005) 20

Gitlow v. New York, 268 U.S. 652 (1925) 34

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 31

Good v. Altria Group, Inc., 501 F.3d 29 (1st Cir. 2007) 19

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) ..... passim

Mangini v. R.J. Reynolds Tobacco Co., 7 Cal.4th 1057 (1994) ..... passim

Mangini v. R.J. Reynolds Tobacco Co., 21 Cal. Rptr.2d 232 (Cal. App. 1993) 7

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 33,34,35

Morse v. Frederick, 127 S. Ct. 2618 (2007) 35

Mount Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) 26

New York State Dept. Social Servs. v. Dublino, 413 U.S. 405 (1973) 21

Peel v. *Attorney Registration Comm'n*, 496 U.S. 91 (1990) 33

People v. Casa Blanca Convalescent Homes, 159 Cal.App.3d 509 (Cal. App. 1984) 5,16

Pharmaceutical Research & Mfrs. v. Walsh,
328 U.S. 644 (2003) 20

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)..... 25,35

Pottawatomie Bd. of Educ v. Earls,
536 U.S. 822 (2002) 37

Rodriguez de Quijas v. *Shearson/American Exp., Inc.*, 490 U.S. 477 (1989)..... 20

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 38

Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,
17 Cal.4th 553 (1998) 6,39

Thomson-Houston Electric Co. v.
Kelsey Electric R. Specialty Co.,
75 F. 1005 (2d Cir. 1896)..... 34

United States v. Edge Broadcasting,
509 U.S. 418 (1993) 32

United States v. Philip Morris, 449 F. Supp. 2d 1 (D.D.C. 2006)..... 16

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 25

Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) .. 30

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 30

Statutes:

15 U.S.C. 45(a) 21

15 U.S.C. 1331 27

15 U.S.C. 1333 3

15 U.S.C. 1334(a) 3

15 U.S.C. 1334(b) ..... passim

15 U.S.C. 1335 3

15 U.S.C. 1336 3

28 U.S.C. 1257 1

42 U.S.C. 300x-21 24

42 U.S.C. 300x-26(a) 20,24

Cal. Bus. & Prof. Code, Section 17200 ..... passim

Cal. Pen. Code, Section 308 ..... passim

Administrative Materials:

61 Fed. Reg. 44619 (Aug. 28, 1996) 17

61 Fed. Reg. 1492 (Jan. 19, 1996)..... 20

29 Fed. Reg. 8355 (July 2, 1964)..... 22

In re R.J. Reynolds Tobacco Co.,
1997 WL 281337 (FTC, filed May 28, 1997)..... 22

Other Materials:

Hills, Against Preemption: How Federalism
Can Improve the Legislative Process,
82 N.Y.U. L. REV. 1 (2007) 21

W. Keeton, *et al.*, PROSSER AND KEETON
ON THE LAW OF TORTS (5th ed. 1984)..... 38

S. Rep. No. 91-566 (1969)..... 4,28

OPINIONS BELOW

The California Supreme Court's opinion is reported at 41 Cal.4th 1257, 163 P.3d 106, and reprinted at Appendix 1a-28a. The opinion of the California Court of Appeal is reported at 20 Cal.Rptr.3d 693 and reprinted at App. 29a-74a. The opinion of the Superior Court (App. 78a-116a) is unreported.

JURISDICTION

The California Supreme Court's final judgment was entered on August 2, 2007. Justice Kennedy extended the time to file this petition to November 30, 2007.

This Court's jurisdiction is invoked under 28 U.S.C. 1257.

STATUTES

The Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. 1334(b), provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

California Bus. & Prof. Code 17200 provides that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or

practice and unfair, deceptive, untrue or misleading advertising * * *"

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech, * * * *"

Other pertinent statutes are set out in the Appendix, 113a-121a.

STATEMENT OF THE CASE

Petitioners, a certified class of California residents who were under age 18 between 1994 and 2000, filed this civil action in state court alleging that, during that time, respondents had intentionally marketed four specific brands of cigarettes to California minors. Petitioners alleged that respondents had thereby engaged in unfair competition in violation of Bus. & Prof. Code 17200, which prohibits, among other things, commercial practices that violate public policies embodied in California statutes. The California Supreme Court, having previously held just such an action not preempted under the FCLAA as construed in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992), held that this Court's decision in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), compelled a contrary result and that purposeful marketing of cigarettes to minors is protected under the First Amendment.

1. The Federal Cigarette Labeling and Advertising Act, enacted in 1965 and amended in 1969, aims to ensure that the public is "adequately informed about

any adverse health effects of cigarettes smoking," but that interstate commerce is not "impeded by diverse, nonuniform, and confusing cigarettes labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. 1331. The Act requires that cigarette packages bear prescribed warning labels, § 1333, prohibits States from requiring additional statements "relating to smoking and health" on packaging, and provides that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion" cigarettes that bear the prescribed labels, § 1334(a), (b).

The FCLAA prohibits the advertising of cigarettes in electronic media, § 1335. It leaves unaffected the Federal Trade Commission's authority to regulate unfair or deceptive acts or practices in cigarette advertising. § 1336.

2. This Court has twice construed the FCLAA's preemption provisions. In *Cipollone*, a plurality ruled that common law claims are preempted under the FCLAA if, but only if, "the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health * * * imposed under State law with respect to * * * advertising or promotion,' giving that clause a fair but narrow reading." 505 U.S. at 524.[1]

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[1] Because three Justices concluded that the FCLAA does not preempt any common law claims, see 505 U.S. at 531

The plurality concluded that plaintiff's claims for failure to warn were preempted because they attacked the adequacy of the FCLAA-prescribed warning labels. *Id.*. His claims of fraudulent misrepresentation and conspiracy to misrepresent or conceal material facts were held not preempted, however, because they were "not predicated on a duty 'based on smoking and health' but on a more general obligation – the duty not to deceive." *Id.* at 528-29. Allowing them to proceed was consistent with "the background presumption against preemption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States," *id.* at 529 n. 27; see id. at 529 n. 25 (noting Congress's intent that provision be "'narrow'" and not affect "the power of any State'" respecting "sale of cigarettes to minors * * * or *similar police regulations*.'") (quoting S. Rep. No. 91-566 at 12 (1969) (emphasis added by Justice Stevens).

In *Lorillard*, the Court held that Massachusetts regulations categorically prohibiting cigarette advertisements within 1000 feet of a school or park were preempted under the FCLAA. The State, which had stipulated its regulations prohibited "truthful non-misleading speech about lawful activity," see 218 F.3d at 43, defended them on the ground that they

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(Blackmun, J., joined by Kennedy and Souter, JJ.), the plurality opinion authored by Justice Stevens has been understood as providing the governing rules of law.

did not prescribe the content of advertisements, and were intended to prevent youth from smoking. Rejecting those arguments, the Court held that Congress had "prohibited state cigarette advertising regulations [including zoning measures] motivated by concerns about smoking and health," and that the concern embodied in the Massachusetts regulations, "about youth exposure to cigarette advertising [was] intertwined with the concern about cigarette smoking and health." *Id.* at 548. The Court emphasized, however, that the FCLAA leaves States with "significant power" to protect youth from harms of cigarette smoking, nothing, for example, that States, "[h]aving prohibited the sale and distribution of tobacco products to minors, * * * may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." *Id.* at 551-52.

3. California's Unfair Competition Law (UCL) prohibits and extends a private cause of action for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Bus. & Prof. Code 17200. The UCL's central prohibition is modeled on the Federal Trade Commission Act, and California courts interpret in light of precedent under the federal statute. See *People v. Casa Blanca Convalescent Homes*, 159 Cal.App.3d 509, 530 (Cal. App. 1984) (citing FTC unfair business practice guidelines approvingly cited in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)). Like the FTC Act, the UCL recognizes

commercial advertising and marketing practices that encourage unlawful transactions to be a mode of "unfair" competition – because, *inter alia*, they disadvantage market participants whose conduct respects the State's laws and public policies. See *Sperry & Hutchinson*, 405 U.S. at 244-245 & n. 5. When a UCL suit seeks relief on this theory, California courts recognize, the plaintiff is not "enforcing" the underlying law, but rather pursuing an "independently actionable" remedy, *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 566, 950 P.2d 1086, 1094 (1998) (citation omitted), one "framed in * * * broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 184 (1999); cf. *Sperry & Hutchinson*, 405 U.S. at 422 (describing FTC's role under § 5 of the FTC Act as "like a court of equity").

In *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 875 P.2d 73 (1994), the California Supreme Court rejected a FCLAA preemption defense to a UCL claim essentially identical to the one at issue in this case. Plaintiff alleged that Reynolds had violated the UCL by deliberately targeting minors in cigarette advertising featuring the cartoon character "Old Joe Camel." After the Court of Appeal, applying the FTC test for unfair competition recognized in

Sperry & Hutchinson,[2] held that plaintiffs stated a UCL claim, noting that ""the targeting of minors in cigarette advertising offends public policy as established by statute."" 7 Cal.4th at 1060 (quoting Court of Appeal; citing Cal. Pen. Code, 308 (a), (b)). The State Supreme Court rejected Reynolds's argument that such a claim was pre-empted. The Court noted that the pre-emption inquiry was controlled by *Cipollone*'s "predicate legal duty" principle and concluded that a holding of non-preemption in Mangini's case followed directly from *Cipollone*'s reasons for finding the fraudulent misrepresentation and conspiracy claims in that case not preempted:

> it is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law. In *Cipollone*, the predicate

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[2] The Court of Appeal explained that FTC, "whose interpretation is entitled to great weight" considers three factors: "(1) whether it offends public policy as established by statutes, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers." 21 Cal. Rptr.2d 232, 241 (1993) (citing *Sperry & Hutchinson*, 405 U.S. at 244-45 n.5).

> duty -- not to deceive-was not "based on smoking and health"; this one is similarly not. "Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to" unfairly assist or advertise illegal conduct.

Id. at 1060 (citations to *Cipollone* omitted).

Taking note of the FLCAA legislative history confirming the vitality of state police powers, and federal statutes conditioning grants to States on their enactment and enforcement of sales-to-minors laws, the court continued:

> No appropriately 'narrow' interpretation of section 1334(b) could conclude, in the fact of this evidence, that Congress nevertheless left states powerless to prohibit advertisements that targets minors and, by targeting minors, that encourage * * * those illegal sales. This evidence of congressional purpose, the 'ultimate touchstone' of preemption analysis * * * shows no intent to preempt the cause of action at issue here.

7 Cal. 4th at 1071-72 (citations omitted). The court also observed that, as with the common-law rules against deceptive advertising at issue in *Cipollone*, enforcing the UCL under these circumstances would not implicate the statutory concerns about confusing or conflicting state standards. *Id.* at 1069.

5. This action was filed in the Superior Court of San Diego County on behalf of a class, later certified by the court, of "all persons who as California

resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994, and December 31, 1999." Petitioners maintained, among other things, that respondents had intentionally targeted minors in their marketing and advertising of four brands of cigarettes -- Marlboro, Camel, Kool and Newport -- in violation of the UCL, and sought equitable relief including disgorgement of the proceeds respondents received from sales of cigarettes to class members.

The suit alleged, for example, that respondents had conducted marketing studies to determine how to induce teenagers between 13 and 17 to smoke; designed advertising and marketing campaigns to appeal to minors; placed advertisements near schools, in video arcades, and in youth-oriented publications; and had paid to have their products placed in films appealing to adolescent audiences. App. 4a-5a. It also alleged that tobacco firms that did not target minors lost market share, dramatically, to respondents. App. 5a. As had the plaintiff in *Mangini*, petitioners maintained that these actions constituted "unlawful, unfair, or fraudulent" business practices under the UCL, because they encouraged violations of Penal Code Section 308.

Petitioners' voluminous evidence of intentional targeting included internal company documents on marketing strategy;[3] testimony of tobacco company

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[3] Dr. Michael Cummings concluded that "evidence from internal industry documents shows that tobacco companies routinely researched the

insiders concerning respondents' efforts to market cigarettes to youth; expert testimony concerning respondents' use of advertising placement, themes, and imagery, to target minors;[4] and their collection of marketing data on teenagers' and pre-teens' likes and dislikes.[5]

The thrust of petitioners' case was not that youth had been incidentally exposed to respondents' advertising, but that minors were in fact its intended audience.

The trial court dismissed plaintiffs' claims as preempted, and the Court of Appeal affirmed, reasoning that while *Mangini* had held the UCL claim nonpreempted because it enforced a general duty "to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law," this Court's decision in *Lorillard*

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smoking habits of teenagers and competed vigorously against each other to design products and marketing plans to capture a share of the teenage smoking market." Cal. Ct. App. AA3458. Dr. Cummings stated that Philip Morris had "segmented and studied children as to their likes and dislikes to position Marlboro as its Youth Brand, placed licorice and chocolate in the cigarettes to appeal to children as a starter cigarette, [and] intentionally placed advertisements and promotions for Marlboros in magazines with a high youth readership * * *." AA76777-8.

[4] See AA735 ("advertising for the four youth brands has been deliberately designed and used to cause adolescents to smoke and to buy cigarettes") (Dr. Cornelia Pechman).

[5] See AA76777 ("as late as January 1999, Philip Morris was still receiving surveys and studies as to the likes and dislikes of boys ages 10-15") (Dr. Cummings). See also AA2849 (Reynolds was receiving surveys of smokers "12 to 20 years of age" as late as 1997).

had "clarifie[d] that, for purposes of FCLAA preemption, the predicate legal duty underlying such a claim is fundamentally based on the more general concern about smoking and health." App. 50a.

The California Supreme Court then granted discretionary review to determine whether *Lorillard* "is inconsistent with, and thus impliedly disapproved, *Mangini*." App. 3a. The court affirmed the conclusion that the UCL targeting claim was preempted. While recognizing that the UCL provision itself was not "based on smoking and health," the court held that preemption should depend on whether *Section 308* reflects concerns about smoking and health. App. 22a. Acknowledging that the statute had been enacted as 19th-century "morals" legislation -- the court observed that more recent amendments revealed a concern with minors' health, App. 23a, and that plaintiffs' claim was therefore preempted under *Lorillard*. See App. 23a (concluding that petitioners' UCL claim "seeks to impose on defendant tobacco companies a duty not to advertise in a way that could encourage minors to smoke,'" which was "precisely the duty that [*Lorillard*] held subject to FCLAA preemption because it is necessarily and inherently based on concerns about smoking and health").

The court proceeded to consider whether petitioners' unfair competition claim could fit within what it termed the "exception[s] to FCLAA preemption," *id.*, recognized in *Lorillard*. The court concluded that *Lorillard*'s observation that

preemption did not reach measures directed at "inchoate offenses" and other incidents of states' prohibitions on distribution to youth "could not have meant to include restrictions * * * on the content and location" of advertising, at least absent an "allegation that the advertisements directly and expressly incited criminal violations." App. 24a .

The court then concluded that the First Amendment would preclude treating companies who target minors in cigarette advertisements as accomplices in the crime of unlawful distribution of cigarettes. Rejecting petitioners' claim that cigarette advertising intentionally directed at minors was not constitutionally protected, the court held that the commercial speech standards recognized in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), applied and held, in view of other available means of "discouraging minors from smoking," that providing for a remedy against those who purposefully market cigarettes to minors violated the First Amendment. App. 25a-27a.

REASONS FOR GRANTING THE WRIT

This case raises fundamental and recurring questions concerning this Court's decisions interpreting the FCLAA, and its federal preemption and commercial speech jurisprudence generally.

In the decision below, the California Supreme Court dramatically renounced its own prior precedent and held that, under the FCLAA, States lack power to hold tobacco manufacturers to the

same fair competition duties to which they hold all other business enterprises and that the First Amendment disables them from regulating advertising whose purpose and effect is to induce young people to smoke cigarettes. This enlargement of the FCLAA's preemptive scope directly conflicts with controlling precedent. As the California court initially and correctly recognized, a cause of action under the UCL is non-preempted under *Cipollone*'s predicate duty test. Contrary to the decision below, nothing in this Court's intervening *Lorillard* decision purported to limit, let alone overrule *Cipollone*'s controlling rule.

To the extent the decision below understood *Lorillard* as having settled that States may never prohibit advertising specifically intended to encourage youth smoking, it was fundamentally mistaken. That issue was not presented in *Lorillard*, which involved a regulation adopted out of concerns about the *effect* of advertising on youth, and the opinion gave strong indication that a law directing at conduct specifically intended to encourage unlawful youth smoking would be permissible. Moreover, although *Lorillard*, somewhat unusually, attached significance to a state's motive in deciding preemption questions, it did not hold that the presence of a health motive requires preemption when, as here, it is undisputed that the (1891-vintage) law was already in force for unrelated reasons.

Nor does the First Amendment impose the limit the decision below believed. This Court has long held – in opinion passages cited in *Lorillard* – that advertising encouraging unlawful commercial transactions is entitled to no solicitude. The suggestion that this principle applies only to the (null) set of cases where the conduct would be unlawful for every single member of the audience has no support in this Court's precedents, and its conclusion that the First Amendment requires States to limit themselves to policy "alternatives" that are less effective reflects a further misunderstanding of the *Central Hudson* rule.

Finally, the remarkable result is untrue to the text and structure of FCLAA and the background understandings it reflects. Although the statute (and its preemption provision) reflect a rule, again consistent with themes of First Amendment commercial speech doctrine, that adults should generally be free to make the decision to purchase cigarettes, so long as they receive the government-approved warning (and no intentionally false information), it *also* rests on an understanding that minors should not make such decisions until they reach the age of majority. Although, as *Lorillard* suggests, Congress may have recognized that youth exposure to advertising would be a consequence of the regime the FCLAA adopted for adults, Congress did not intend that the prescribed health warnings would immunize advertising directed at children.

Given the fundamental importance of the issues at stake and the deep confusion – among courts,

legislatures, and regulated parties – as to the powers retained by the States under the FCLAA and the First Amendment to act against those who intentionally target young people, this Court's intervention is warranted.

I. THE CALIFORNIA SUPREME COURT'S PREEMPTION RULING CONFLICTS WITH THIS COURT'S DECISIONS

A. The Court Misread *Lorillard* to Alter *Cipollone*'s Predicate Legal Duty Test

The California Supreme Court's erroneous interpretation of the preemption provision is especially remarkable because that court had confronted – and correctly resolved – precisely the same issue in its prior *Mangini* decision. In that case, the court recognized that *Cipollone* governed – and precluded – the tobacco company's preemption defense to a UCL claim challenging advertising intended to induce young people to purchase and smoke defendant's cigarettes, in violation of California law. 7 Cal.4th at 1060. Recognizing that the critical question under section 1334(b) is whether the duty the plaintiff seeks to enforce is one based on smoking and health, *Mangini* correctly held that plaintiffs' claims arose under the UCL, a statute that generally requires businesses to compete fairly in the California market – for reasons no one would say were "based on smoking and health." Indeed, the specific aspect of the UCL at issue here (and in *Mangini*), the principle that business practices that

encourage and profit from the violation of California laws and public policy are "unfair," is also one that applies equally to laws and conduct that have nothing to do with smoking or health. *E.g.*, *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817 (Cal. 1972) (filing debt collection suits in inconvenient fora); *Casa Blanca Convalescent Homes*, 206 Cal. Rptr. 164 (violating nursing home hygiene regulations); *Cel-Tech Communications*, 20 Cal. 4th 163 (predatory pricing of telephones).

And as *Mangini* explained, the non-preemption conclusion yielded by straightforward application of *Cipollone*'s predicate legal duty test is strongly reinforced by the similarities between the claim advanced here and causes of action held outside the FCLAA's preemptive domain there. 7 Cal. 4th at 1071. Like the fraudulent misrepresentation and conspiracy claims held non-preempted in *Cipollone*, the UCL's prohibition of unfair competition is, undisputedly, not a law "based on smoking and health." And like those claims, petitioners' UCL claim required a showing of intentional wrongdoing by respondents (in *Cipollone*, to mislead consumers regarding smoking's health effects; here, to induce minors to obtain products barred them by California law).[6]

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[6] The extensive record of intentional targeting of minors in this case mirrors judicial and administrative determinations on targeted cigarette advertising. In *United States v. Philip Morris*, 449 F. Supp. 2d 1 (D.D.C. 2006), after a lengthy trial, the court found leading tobacco companies, including respondents, to have violated RICO, based in part on their

In explaining its complete reversal of course, the California Supreme Court pointed to a single intervening development, this Court's decision in *Lorillard* as "disapproving" of the *Mangini/Cipollone* approach. App. 3a. But nothing in the opinion in *Lorillard* (authored by a member of the *Cipollone* plurality) purported to alter or scale back the predicate duty inquiry in cases involving enforcement of general legal principles of tort or unfair competition law. The Court had no occasion in *Lorillard* to dwell on the *Cipollone*-mandated inquiry – in FCLAA terms, the relevant "requirement or prohibition" was indisputably the Massachusetts regulations restricting tobacco advertising near schools and parks. The questions this Court resolved, in favor of preemption) were (1) whether this tobacco-specific prohibition was one "based on smoking and health," see 533 U.S. at 551-52, and (2) whether, as a threshold matter, FCLAA preemption applies to all State regulation of cigarette advertising or only measures aimed at the content of such advertising. 533 U.S. at 547-50; *id.* at 595-98 (dissenting opinion). But those conclusions do nothing to unsettle the analysis here – it is no more plausible after *Lorillard* than before to describe the UCL claim as imposing a smoking and health duty.

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longstanding efforts to identify ever more effective means of marketing cigarettes to minors. The court's findings youth marketing comprise over 100 pages of the Federal Supplement. *Id.* at 561-691. See also, *e.g.*, 61 Fed. Reg. 44619, 45246-47 (Aug. 28, 1996) (FDA).

The decision below read *Lorillard* as holding that the motivations underlying a particular application of a general legal duty determine whether a suit is preempted. App. 20a ("*as applied in the particular case*"), 22a ("particularized application"). But that view would have led to a different result in *Cipollone* itself. Plaintiffs' fraudulent misrepresentation claim there alleged that the defendants "had possessed, but had 'ignored and failed to act upon' medical, and scientific data indicating that 'cigarettes were hazardous to the health of consumers.'" 505 U.S. at 510 (quoting complaint; emphasis added). Similarly, the non-preempted conspiracy claim in *Cipollone* alleged "a conspiracy among respondents to misrepresent or conceal material facts concerning the health hazards of smoking." *Id.* at 530 (emphasis added). The avowedly health-based concerns animating these particular applications of the predicate duties did not trigger preemption, because the duties themselves (the FCLAA "requirements and prohibitions") were not based on smoking and health.

The *Cipollone* plurality recognized that such claims can be characterized at different levels of generality – e.g., as part of a duty "not to deceive" or as a more specific duty not to mislead consumers regarding the health hazards of cigarettes. 505 U.S. at 529 n.27. The plurality rejected the latter approach (advocated by the dissenting Justices), concluding that "to analyze fraud claims at the lowest level of generality * * * would conflict both with the background presumption against pre-

emption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." *Id.*

Indeed, in a recent decision under another State's "little FTC Act," the First Circuit conducted an analysis consistent with *Cipollone* and incompatible with the decision below. *Good v. Altria Group, Inc.*, 501 F.3d 29 (1st Cir. 2007), held not preempted a claim asserting that defendants' practice of advertising their cigarettes as "light" and "low tar" was "unfair or deceptive" under the Maine Unfair Trade Practices Act, 5 M.R.S. § 207. Rejecting the defendant's submission that *Lorillard* mandated preemption because health concerns were at issue, the court explained:

> this argument again confuses the claim at hand with its predicate state-law duty as the relevant "requirement or prohibition" under § 1334(b). The plaintiffs' claims are indeed 'intertwined with the concern about cigarette smoking and health,' just as surely as the regulations in [*Lorillard*] were; the difference, however, is that those regulations were themselves the 'prohibitions,' while the prohibition here is the ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act.

501 F.3d at 38-39. The First Circuit saw "nothing in *Lorillard* suggesting any intent to disturb" *Cipollone*'s distinction between a broader state duty "not to deceive" and concerns about "smoking and

health" that may well be implicated by particular efforts to enforce that duty. *Id.* at 39 (quoting 505 U.S. at 529-30). See also *Gerrity v. R.J. Reynolds Tobacco Co.*, 399 F. Supp. 2d 87, 94 (D. Conn. 2005).[7]

B. As in *Bates*, the State Law Duty Here Parallels the Requirements of Federal Law.

The cause of action in this case arises under a statute modeled on the FTC Act, and was recognized under a judicial "unfair practices" test developed by the FTC and approved by this Court. It operates in aid of a State ban on sales to minors affirmatively encouraged by federal law, 42 U.S.C. 300x-26(a).[8] In holding petitioners' cause of action preempted, the decision below disregarded a basic tenet of this Court's preemption jurisprudence, that when State and federal laws impose "parallel requirements," a finding of preemption is seldom warranted. See *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 448 (2005); *Pharmaceutical Research & Mfrs. v. Walsh*,

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[7] If court below believed *Lorillard* had undermined *Cipollone*'s rationale, the proper approach was to apply the precedent that directly controls, "leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Exp., Inc.*, 490 U.S. 477, 485 (1989).

[8] This provision conditions certain grants to States on their adoption of laws banning tobacco sales to minors, and requires States to report on the efficacy of such bans and their enforcement strategies. See *Lorillard*, 533 U.S. at 552, 571. See 61 Fed. Reg. 1492, 1495 (Jan. 19, 1996) (HHS's conclusion that states should have "flexibility to determine which strategies are most appropriate for meeting the compliance target").

328 U.S. 644, 666 (2003) (presumption has "special force when it appears * * * that the two governments are pursuing 'common purposes'") (quoting *New York State Dept. Social Servs. v. Dublino*, 413 U.S. 405, 431 (1973)). See Hills, Against Preemption: How Federalism Can Improve the Legislative Process, 82 N.Y.U. L. REV. 1, 68 (2007) (*Bates* "re-focused preemption analysis on the critical issue of whether state statutory and common law rules impose different requirements upon a federally-regulated industry as opposed to merely parallel requirements").

The FCLAA expressly reserved the FTC's authority "with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. 1336. *Cipollone* explained that this savings clause showed Congress did not wish to "insulate cigarette manufacturers from longstanding rules governing fraud." 505 U.S. at 529. See also *Philip Morris*, 263 F. Supp. 2d at 80 (explaining that *Cipollone* "rejected [tobacco companies'] arguments that the FTC has exclusive authority" over such claims).

The UCL's definition of "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" was modeled upon Section 5(a) of the FTC Act, 15 U.S.C. 45(a) (prohibiting "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices"). Indeed, the specific legal theory underlying a UCL targeting claim derives directly from FTC guidelines

concerning unfair competition in advertising of tobacco, and were cited approvingly by this Court. See *Sperry & Hutchinson* , 405 U.S. at 244 & n.5. (quoting 29 Fed. Reg. 8355 (July 2, 1964)). The FTC itself brought an action under § 5(a) against respondent R.J. Reynolds for targeting minors in its "Joe Camel" campaign, see *In re R.J. Reynolds Tobacco Co.*, No. 9285, 1997 WL 281337 (filed May 28, 1997); *id.* ¶ 15. (citing State bans on youth purchase in support of charge).[9] California's UCL remedy for intentional targeting of minors is in harmony with federal law.

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[9] The FTC dismissed the complaint without prejudice in January 1999, concluding that the November 1998 execution of the Master Settlement Agreement between tobacco companies and State attorneys general –which banned the use of cartoon characters in cigarette advertising – had accomplished the "most important elements of the relief" the complaint sought. Order Dismissing Complaint, No. 9285 (Jan. 26, 1999).

C. *Lorillard* Does Not Divest States of Authority Over Advertising Intended To Induce Unlawful Cigarette Purchases

Nothing in *Lorillard* supported the leap taken by the decision below – treating petitioners' UCL suit as if it arose under a statute that imposed a specific duty not to target cigarette marketing to persons too young to lawfully purchase them. But the court below was also wrong to read *Lorillard* as requiring preemption of even such a claim.

At the outset, the Court in *Lorillard* did not have any such regulation before it: the Massachusetts Attorney General had stipulated "that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." 218 F.3d 30, 43 (1st Cir. 2000), and as opinions in this Court emphasized, there was no claim that the advertisements within the regulation's reach were ones that were directed at youth. See 533 U.S. at 578 (Thomas, J., concurring in part). Moreover, the duty imposed – to refrain from advertising cigarettes wherever children were likely to pass by – was in tension at odds with the basic accommodation struck in the FCLAA: *i.e.*, that cigarettes remain a lawful item of commerce (for adult purchasers), which tobacco companies may advertise, so long as they include the federally-mandated health warning.

Indeed, *Lorillard* strongly suggested that States remain free to impose sanctions on those who deliberately induce underage persons to buy their

cigarettes. After holding that concerns about youth smoking could not save Massachusetts's restriction, the Court affirmed States' power (and responsibility, see 533 U.S. at 552 (citing 42 U.S.C. 300x-26(a)(1), 300x-21), to proscribe the distribution of tobacco to youth, and that the FCLAA should not be read as preempting measures implementing those prohibitions. See *id.* at 552. Citing precedents confirming that the First Amendment does not inhibit government measures prohibiting the advertisement of unlawful conduct – as well as "evidence that [the tobacco] industry may be attempting to induce individuals under 18 to smoke cigarettes" – the Court explained:

> Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt.

Id. (citing *Central Hudson*, 447 U.S. at 563-64; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); and *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) and 60 Fed. Reg. 41330-41332 (1995)).[10]

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[10] The FDA preamble the Court cited says: "Industry documents indicate that cigarette manufacturers have conducted extensive research on smoking behavior and attitudes in young people and how advertisements should be made to appeal to young people," and that Reynolds' youth market share increased at least threefold after Joe Camel appeared.

The decision below took a tortured – and untenable – view of this part of *Lorillard*, suggesting that the "exception" to preemption for "inchoate offenses" was inapplicable here because (1) petitioners faulted defendants' for "aiding and abetting" violations of section 308, rather than "solicitation" (which was mentioned in *Lorillard*) and (2) California has not, in fact, made "solicitation" of under-age tobacco purchases a criminal offense, see App. 25a n.3.

To the extent the opinion understood *Lorillard* to mean that only a State's criminal laws implementing a distribution ban are beyond preemption, it is obviously mistaken: the decisions *Lorillard* cited did not involve criminal sanctions, and the Court has long recognized that States' authority to deal with "speech proposing an illegal transaction" may be exercised *either* through regulation or an outright ban. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) (citing *Central Hudson*, 447 U.S. at 563-64 and *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973)). Indeed, a rule that pressured a State (on pain of preemption) to enforce its policies only through criminal laws would be incompatible with the First Amendment's "greater tolerance of enactments with civil rather than criminal penalties." *Hoffman Estates*, 455 U.S. at 498.

Even the part of the *Lorillard* opinion that appears superficially most helpful to the approach

taken below falls far short of actually supporting it. In rejecting Massachusetts's argument that concern with youth smoking – rather than smoking generally – took its measure outside of Section 1334's preemptive reach, *Lorillard* indicated that the preemption question should turn on the motives animating the State law at issue, a proposition that led the court below to examine Section 308 afresh – and ultimately, to decide that the UCL claim was preempted after all. But *Lorillard*'s somewhat unusual approach to preemption (an analysis that generally focuses on the purpose of Congress) came with built-in limitations – as just noted, it is common ground that a prohibition against "solicitation" of cigarette purchases, even if rooted in health concerns, is beyond the FCLAA's reach. Measures regulating cigarette advertising targeted at adolescents serve purposes distinct from reducing adverse health effects – including expressing disapproval of commercial behavior seen as morally blameworthy (both because it evinces disrespect for positive law and because it seeks to take commercial advantage of vulnerabilities and limitations in its audience). Moreover, under doctrines that treat purpose as determinative of the validity of government action, it is usually the rule that the action should stand upon proof that it would have been taken absent the suspect purpose. See, *e.g.*, *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). Here, there is the strongest possible evidence that California would have enacted Section 308 for reasons unrelated to smoking and health – it

predates by more than 70 years the Surgeon General's groundbreaking 1964 report.

D. The FCLAA Reflects No Intent to Shield from State Law the Intentional Targeting of Minors in Cigarette Advertising

Even if *Cipollone* had not be decided, it is simply implausible that in enacting the FCLAA, Congress meant to settle that cigarettes could freely be advertised to children – so long as the warning label was displayed. On the contrary, the approach embodied in the labeling law – assuring that those making the (lawful) decision to smoke would do so based on accurate health-risk information, was surely not Congress's choice for those under 18. And a civil remedy for the intentional targeting of minors does not implicate the potential harms to "commerce and the national economy" that Congress feared from "diverse, nonuniform, and confusing cigarettes labeling and advertising regulations." 15 U.S.C. 1331. The UCL rule here establishes a "single, uniform standard," *Cipollone*, 505 U.S. at 529: Companies may not intentionally market cigarettes to minors who cannot lawfully obtain them. That duty is every bit as easy for conscientious companies to meet as is the approved "duty not to deceive" by false statements. Indeed, when the FCLAA was amended in 1969, the tobacco companies themselves "stated to the [congressional] committee that with respect to all other [i.e., non-electronic] advertising, they would *avoid advertising directed to young persons* * * * *" 1970 U.S.C.C.A.N. at 2663 (Sen.

Rep. No. 91-566 (1969) (emphasis added). Enforcing a principle the companies pledged to honor would hardly constitute the kind of "chaotic" interference with interstate commerce Congress meant to prevent. Cf. *Cipollone*, 505 U.S. at 525.

II. THE COURT'S READING OF THE FIRST AMENDMENT CONFLICTS WITH THIS COURT'S CONTROLLING PRECEDENT

The decision below also held that California's provision of a civil remedy against advertising intended to persuade minors to unlawfully purchase and smoke cigarettes would violate respondents' constitutional right of free speech. After concluding that such advertising is protected speech, because the audience was not comprised "exclusively" of minors for whom cigarettes would be unlawful, the court held that California's law failed the *Central Hudson* test. While recognizing that California has a "substantial interest in discouraging minors' purchase and use of cigarettes," and that "restricting advertising that has the effect of encouraging minors to smoke would directly advance that interest," the court held that the final constitutional requirement, that regulation of speech proposing a commercial transaction not be "'more extensive than is necessary to serve [the state's] interest,'" was not satisfied. App. 26a (quoting *Central Hudson*, 447 U.S. at 566).

In particular, the court referenced other means of dealing with "overall problem" of youth smoking, and held that "treating defendants' conduct in

advertising their cigarettes as aiding and abetting a violation of Penal Code section 308, thereby rendering defendants subject to criminal prosecution whenever a minor acquires the cigarettes they marketed, is not a 'reasonable fit' with the state's purpose of discouraging smoking by minors." App. 27a.

This Court's jurisprudence provides no support for the notion that the First Amendment limits a state's power to holding a seller civilly liable for advertising that purposefully induces an unlawful transaction.

At the outset, this suit does not involve any effort to hold respondents criminally liable or to reinterpret Penal Code Section 308. It seeks to apply a settled construction of the unfair competition statute – as providing a civil remedy against those whose advertisements purposefully encourage unlawful transactions – in a context where the law prohibiting the proposed transaction is Section 308. Nor does this suit seek to "restrict[] advertising that has the effect of encouraging minors to smoke" (App. 26a) – its gravamen is that respondents acted with the intent of inducing minors' cigarette smoking, contrary to the laws and public policies of California. It is not the fact that "a minor acquires the cigarettes they marketed" (App. 27a) that gives rise to liability, but that respondents intended and contributed to the result. Finally, although suits like the present one can be expected to have a salutary, quantitative effect on the "overall problem" of youth smoking, that is not the only or even the primary purpose of

the Section 17200 remedy generally or under these particular circumstances – it expresses societal disapproval of those who intentionally encourage violation of laws governing commercial transactions – among whom those urging children to purchase cigarettes in violation of Penal Code section 308 have no claim to especially favorable treatment.

A. Tobacco Companies Do Not Have a First Amendment Right to Market Cigarettes to Children

These distortions aside, under a proper understanding of this Court's commercial speech precedents, the companies' assertion of a constitutional right to advertise cigarettes to children would have failed at the threshold. In *Virginia Pharmacy Board* and *Central Hudson*, the Court held that the First Amendment "protects commercial speech from unwarranted governmental regulation" – but it also recognized – in the very passages of those decisions cited in *Lorillard* – that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 563. Because "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), "for commercial speech to come within [the First Amendment's protection], "it at least must concern lawful activity and not be misleading." *Lorillard*, 533 U.S. at 554 (quoting

Central Hudson, 447 U.S. at 556).

Petitioners seek to apply a California law imposing civil liability based on commercial speech that is not merely "related" to illegal activity – but indeed was specifically intended to encourage violations of the law.[11] Remarkably, the decision below held that the protections of the Free Speech Clause were nonetheless available because "Defendants' cigarette advertising * * * [was] [not] addressed * * * *exclusively* to minors." App. 26a. (emphasis added). But this is not the law. To be sure, advertising does not lose its First Amendment protection whenever its audience might include individuals for whom the activity promoted is unlawful – see *Lorillard*, 533 U.S. at 554-55. But it cannot be that States lose their recognized power to regulate advertising promoting unlawful activity if there is one member of the audience for whom the activity was lawful – an advertisement offering a Schedule I controlled substance would not acquire First Amendment protection based on the fortuity that it might be seen by a member of a religious sect specially licensed to use it, see *Gonzalez v. O Centro*

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[11] California's UCL requires that business competition take place within the bounds set by the State's laws and that market participants should not gain a leg up by promoting transactions that are lucrative, but unlawful – a concern that applies with maximal force here, where firms in the market recruit young "replacement" customers and where the unlawful activity, youth smoking, can lead to a lifelong brand commitment and decades of profits, exerting extraordinary competitive pressure to match a competitor's breach of the rules.

Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); nor would a California advertisement for prostitution become constitutionally protected on the ground that it might be seen by a resident of the Netherlands – or Nevada. Cf. *United States v. Edge Broadcasting*, 509 U.S. 418 (1993).[12] All the more so, where, as here, the advertising can be shown to have been *directed* at those for whom the activity is unlawful. See *Flipside*, 455 U.S. at 502 (upholding punishment of vendor who sold books such as "Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers," explaining that regulation of "items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use").

The allegations and evidentiary record in this case go far beyond the harms associated with incidental exposure. The core of the suit is that respondents' advertising and promotional activities – fueled by decades of expensive, sophisticated, clandestine market research – intentionally targeted young people, seeking to overcome their resistance to smoking and defeat the efforts of parents, schools, pediatricians, the State of California (and the United States), to persuade them, at the very least, to postpone the decision to smoke until they had reached lawful age. Liability is not sought based on

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[12] Indeed, any such rule would be a complete inversion of federalism-protecting rules concerning facial challenges and First Amendment overbreadth. A State could rely on the *Central Hudson* principle only after establishing that there is no member of the audience for whom the transaction is lawful.

the fact that "a minor acquires the cigarettes [respondents] marketed," App. 27a – but rather on the fact that this unlawful result was the very end and aim of respondent's marketing efforts.[13]

The legal regime at issue is thus critically different from the one addressed in *Lorillard* – where there was no claim of intentional targeting. See 533 U.S. at 578 (Thomas, J., concurring in part and concurring in the judgment) ("Massachusetts has done nothing to target its prohibition to advertisements appealing to 'excitement, glamour, and independence' * * * smokers depicted on the sides of buildings may no more play shuffleboard than they may ride skateboards").

The error of the court's assumption (and respondents' even more extravagant claims) that the First Amendment stringently limits holding sellers civilly liable for unlawful conduct they encourage (and profit from) can be appreciated in light of this Court's recent decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). In that case, the Court embraced a rule of civil liability for purposefully inducing unlawful

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[13] The principal ground for unlawfulness here is that younger people are less able than adults to accurately process risk information, meaning that the commercial speech doctrine's general aversion to paternalism has no place. Cf. *Peel* v. *Attorney Registration Comm'n*, 496 U.S. 91, 105 (1990) (rejecting the "paternalistic assumption" that adult readers "no more discriminating than the audience for children's television").

conduct (copyright infringement), based on a century of experience under patent law -- without any suggestion that the speech encouraging violations was constitutionally protected or that heightened (let alone strict) scrutiny, must be applied before Copyright Act liability could be imposed.[14] The *Grokster* Court explained:

> [T]he classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, BLACK'S LAW DICTIONARY 790 (8th ed. 2004), as by advertising.

545 U.S. at 935 (citation omitted). As *Grokster* then explained, "premis[ing] liability on purposeful, culpable expression and conduct * * * does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 937.

Although respondents argued below (with some success, see App. 24a) that an advertisement calculated to persuade a minor to purchase their cigarettes should be treated as the constitutional equivalent of a political speech that leads its audience to violate some law, cf. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement"), this Court's cases support a much less credulous approach, one distinguishing between speech that proposes an

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[14] *Thomson-Houston Electric Co.* v. *Kelsey Electric R. Specialty Co.*, 75 F. 1005 (2d Cir. 1896) (secondary liability for patent infringement based "on advertisements and displays") (cited in *Grokster*).

unlawful transaction – for the advertiser's economic benefit – and that which has the effect of encouraging others to violate a law, in ways that align with the speaker's political views. See *Pittsburgh Press*, 413 U.S. at 391; cf. *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007). Petitioners have no more a "First Amendment right" to profit from the unlawful cigarette purchases they induce than *Grokster* had the right to encourage unlawful copying of protected works.

B. The Decision Rests On A Fundamental Misunderstanding of the Final *Central Hudson* Prong

Apart from its erroneous premise that laws regulating advertising that, in intent and effect, proposes an unlawful transaction, must still run the First Amendment gauntlet, the California Supreme Court's refusal to enforce the State's unfair competition law here rests on a further misunderstanding of the *Central Hudson* test.

The court concluded that the Section 308 remedy was more restrictive than necessary to accomplish the state's objectives:

> California has, and has employed, many other means of carrying out its policy of discouraging minors from smoking, such as prosecuting retailers who sell cigarettes to minors, taxation to raise the price of cigarettes, advertising and other publicity about the dangers of smoking, and legal actions to restrict the distribution of

cigarettes in places where minors are present. Through the state Attorney General, California has brought suit under the state unfair competition law to enjoin defendants from targeting minors in their advertising, and it has secured a settlement in which defendants agreed to refrain from such advertising. It has filed actions to enforce that settlement.

This conclusion disregards *Central Hudson* in four ways. First, for the reasons just explained, the civil liability rule is not overly restrictive – it does not restrict any speech the First Amendment seeks to encourage – it allows respondents to communicate truthful information about lawful activity and does not seek to hold them accountable for unlawful activity that they did not purposefully intend to encourage. Second, any judicial invalidation based on the availability of "alternative" means must respect the full range of (legitimate) ends the government is seeking to achieve. As noted, the objective of the Section 17200 remedy is not confined to reducing unlawful conduct, it seeks to regulate business practices that the state deems unfair and/or morally blameworthy; the measures catalogued below are not alternative means of accomplishing that objective.

Third, before invalidating as "unnecessary" a law that directly and substantially advances an important governmental interest as "unnecessary," a court must satisfy itself that the "less restrictive alternatives" it leaves will, in fact, "adequately * * * serve[] the governmental interest," *Board of*

Trustees, SUNY v. Fox, 492 U.S. 469, 480 (1989). But here, experience shows that the full complement of means at the State's disposal to be inadequate to the task of preventing youth smoking. Cf. *Pottawatomie Bd. of Educ v. Earls*, 536 U.S. 822, 839 (2002) (Breyer, J., concurring). And many of the "alternatives" cited in the court's opinion are no such thing. For example, the prospective judicial remedies referred to by the court below have literally no application to the conduct that is the subject of this suit: The Master Settlement Agreement did not take effect until years after most of the actions at issue – and it explicitly preserved the legal rights of private parties, see App. 4a.[15]

The suggestion that enforcement suits against retailers and (purchasers) are effective enough that remedies against those who encourage unlawful conduct are unnecessary is especially strange. On their face, such measures cannot affect at all the large proportion of violations that involve purchases by persons of lawful age, and in no other law enforcement regime is it assumed that exclusive, case-by-case pursuit of those on the lowest rung of the distribution ladder is an effective strategy, see 21 U.S.C. 841(b); *Grokster*, 545 U.S. at 930 (noting practical difficulty of individuals actions against

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[15] It is not obvious that it represents a "*less* restrictive alternative"; it is a startling inversion of First Amendment law (and equity principles in general) to deny an injured party a retrospective remedy at law on the ground that an injunction of ostensibly protected speech might have issued.

direct violators). And while this Court has held that advertising restrictions should not be a first resort or a *substitute* for banning conduct, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995), there is no precedent for jettisoning a "speech" restriction when the conduct rule is only partly effective – and when an admittedly effective weapon when doing so would set back the government's ability to achieve important public purposes.

Finally, the court's premise that "smoking by minors" *must* be attacked on a no-fault basis, "as an overall problem," draws no support from the law or public policy of California, the First Amendment, or any other legal source. California has determined (as has almost every other objective authority) that targeted cigarette advertising in fact contributes hugely to the "overall problem," and – consistently with deeply entrenched norms of civil justice has authorized remedy against those whose role in purposefully bringing about the unlawful result is especially blameworthy. See W. Keeton, *et al.*, PROSSER AND KEETON ON LAW OF TORTS 37 (5th ed. 1984) ("There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong"); *Edge Broadcasting*, 509 U.S. 418 (citing "room for legislative judgments" in commercial speech cases). Finally, California has decided, again entirely reasonably, that the policies expressed in Section 17200 are advanced by allowing affected consumers (and competitors) to sue directly, rather than rely exclusively on the State Attorney General

for enforcement (indeed, the Attorney General participated in this suit as an amicus supporting petitioners). See *Stop Youth Addiction*, 17 Cal.4th at 578.

III. THE CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S REVIEW

This case concerns business practices that it would be hard to believe occurred were the facts not set out at length in the evidentiary record complied in this case and in judicial opinions which themselves rely on internal company documents. In the decision below, the court held, remarkably, that federal law grants tobacco companies an unqualified license to purposefully market cigarettes to persons under 18, who, as a matter of positive law, may not smoke them, but who in fact do so, at epidemic rates. Indeed, the decision held that such advertising was doubly protected – both by the preemption provision Congress enacted in 1969 and as free speech protected by the First Amendment, which is beyond legislative amelioration. This immunity is unique to companies that seek to incite and profit from violations of laws prohibiting cigarette purchases by minors; an enterprise that encouraged California minors to infringe copyrights would surely have no First Amendment defense.

As explained above, this state of affairs does not reflect a necessary or correct reading of the statute,

and it is contrary to the best understanding of this Court's FCLAA preemption and commercial speech case law. *Cipollone* is best read as affirming States' power to enforce general-duty statutes in cases like this one, and *Lorillard* suggests (though it does not hold) that a State law specifically addressing targeted youth marketing would be enforceable, a conclusion supported by the text, structure and history of the FCLAA and the background norms against it was enacted.

But as the zig-zag pattern of the California decisions on this large and practically important question – and the broader pattern of conflict and confusion elsewhere – highlights, this Court's splintered decision in *Cipollone* left considerable ambiguity, and courts continue to struggle with whether and how that decision has been affected by later ones concerning both FCLAA preemption, see Lorillard and federal preemption generally.

In view of the widespread recognition that youth smoking is an intractable social and health problem of the first order, see *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) -- and that marketing cigarettes to minors is both effective and pernicious, it is important that this Court more clearly settle the metes and bounds of governmental power in this area, so that those seeking to address the problem need not do so in the shadow of large legal uncertainty and under the threat of socially costly and unpredictable preemption litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 30, 2007

APPENDIX

41 Cal.4th 1257, 163 P.3d 106, 63 Cal.Rptr.3d 418,

Supreme Court of California
In re TOBACCO CASES II.
No. S129522.

Aug. 2, 2007.

Blumenthal & Markham, Norman B. Blumenthal, David R. Markham, Kyle R. Nordrehaug, La Jolla; Thorsnes, Bartolotta & McGuire, Vincent J. Bartolotta, Jr., John F. McGuire, Karen Frostrom, San Diego; Chavez & Gertler, Mark A. Chavez, Mill Valley; and Thomas E. Sharkey, San Diego, for Plaintiffs and Appellants.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, William N. Brieger, Acting Chief Assistant Attorney General, Tom Greene, Chief Assistant Attorney General, Dennis Eckhart, Albert Norman Shelden and Herschel T. Elkins, Assistant Attorneys General, Ronald Reiter, Seth E. Mermin and Alan Lieberman, Deputy Attorneys General, as Amici Curiae on behalf of Plaintiffs and Appellants.
Munger, Tolles & Olson, Gregory P. Stone, Daniel P. Collins, Los Angeles, Steven B. Weisburd, Anne M. Voigts; Seltzer CaplanMcMahon Vitek, Gerald L. McMahon and Daniel E. Eaton, San Diego, for Defendant and Respondent Philip Morris USA Inc.
Gray Cary Ware & Freidenrich, DLA Piper Rudnick Gray Cary, DLA Piper US, William S. Boggs, Brian A. Foster, Brian A. Fogarty, San Diego; Shook Hardy & Bacon, Craig Gustafson and Gregory L. Fowler, for

Defendant and Respondent Lorillard Tobacco Company.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Dechert LLP, San Francisco, H. Joseph Escher III, Todd E. Thomson; Wright & L'Estrange, Robert C. Wright, San Diego; Jones, Day, Reavis & Pogue, Jones Day and William T. Plesec, for Defendants and Respondents R.J. Reynolds Tobacco Company.

Sedgwick Detert Moran & Arnold and Steve D. DiSaia, for Defendant and Respondent Brown & Williamson Tobacco Corporation.

Susan Liebeler; Daniel J. Popeo and Richard A. Stamp, for Washington Legal Foundation as Amicus Curiae on behalf of Defendants and Respondents.
Horvitz & Levy, Lisa Perochet, John A. Taylor, Jr., Jeremy B. Rosen, Encino; Cahill Gordon & Reindell, Floyd Abrams and Joel Kurtzberg, for Association of National Advertisers, Inc., American Advertising Federation and American Association of Advertising Agencies as Amici Curiae on behalf of Defendants and Respondents.

Hugh F. Young, Jr.; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Gail E. Lees and William E. Thomson, Los Angeles, for The Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendants and Respondents.

Fred J. Hiestand, Sacramento, for The Civil Justice Association of California as Amicus Curiae on behalf of Defendants and Respondents.

KENNARD, J.

***1262 **108** In *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73(*Mangini*), this court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) (15 U.S.C. § 1331 et seq.), which regulates tobacco advertising, did not preempt a claim against tobacco companies under the state unfair competition law (Bus. & Prof.Code, § 17200 et seq.) for advertising cigarettes in a manner that encouraged minors to begin smoking. The main issue presented here is whether, as the Court of Appeal *****422** concluded, the United States Supreme Court's later decision in *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532(*Lorillard*) is inconsistent with, and thus impliedly disapproved, *Mangini.* We agree with the Court of Appeal, and we are bound to accept the high court's decision in *Lorillard* as controlling authority. Accordingly, we will affirm the Court of Appeal's judgment.

In 1994, four years before this action was filed, the Attorney General of California joined with the attorneys general of the other 49 states in bringing ***1263** an action against six tobacco companies, including Phillip Morris Incorporated (Phillip Morris), R.J. Reynolds Tobacco Company (R.J. Reynolds), Lorillard Tobacco Company (Lorillard), and Brown & Williamson Tobacco Corporation (Brown & Williamson). In November 1998, that action was resolved by a master settlement agreement under which the defendants agreed to pay the states a total of $206 billion and consented to an

injunction barring them from "[t]aking any action, directly or indirectly, to target" minors in their advertising, promotion, or marketing of tobacco products.[1]**109 (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317.) The settlement agreement also enjoined the defendants from engaging in a number of specific advertising and promotion techniques, such as brand-name sponsorship of events with a significant youth audience. The defendants expressly waived any claims that any provision of the agreement violated state or federal Constitutions. (116 Cal.App.4th at 1266, fn. 10, 11, Cal.Rptr.3d 317) the agreement provided that it settled claims only by the state attorneys general, so that individual plaintiffs retained the right to sue.

A month before the master settlement agreement was executed, plaintiffs Devin Daniels, Bryce Clements, Daimon Fullerton, Nicole Morrow, and Maren Sandler filed this class action against Phillip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson on behalf of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994, and December 31, 1999." (*Daniels v. Phillip Morris Companies, Inc.* (Super. Ct. San Diego County, 1998, No. 719446).) Plaintiffs' complaint, based in large part on the California Attorney General's complaint in the 1994 action, alleged that defendant tobacco

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[1] Forty-six states, including California, signed the master settlement agreement, while the other four states settled independently.

companies' advertising and promotional activities intentionally targeted minors.

Specifically, plaintiffs alleged that defendants R.J. Reynolds and Phillip Morris conducted marketing studies to determine how best to induce teenagers ages 13 to 17 to begin smoking; that all defendants designed advertisements and marketing campaigns to appeal to minors; that these campaigns included placing advertisements near schools, near playgrounds, in video arcades, and in youth-oriented publications; that defendants sponsored sporting events and concerts that appealed to minors; and, finally, that defendants paid to have their products used in films that appealed to youth audiences. Plaintiffs alleged that other tobacco companies that did not target minors lost market shares to defendants.

***423** Plaintiffs alleged that defendants' conduct violated the state unfair competition law, which authorizes civil suits for "any unlawful, unfair or fraudulent *1264 business act or practice and unfair, deceptive, untrue or misleading advertising" (Bus. & Prof.Code, § 17200), because the conduct encouraged or induced violation of Penal Code section 308, which prohibits the sale of tobacco to minors and the purchase and possession of tobacco by minors. Defendants' advertising campaigns, plaintiffs alleged, succeeded in inducing plaintiffs and all other members of the class to begin using defendants' cigarettes when plaintiffs were still minors; plaintiffs and the other class members became addicted to nicotine and are unable to stop smoking, spending

substantial sums annually to buy cigarettes. In their second amended complaint, at issue here, plaintiffs seek restitution of defendants' profits from the sale of cigarettes to minors since April 2, 1994.

Other plaintiffs filed actions similar to the suit filed by plaintiffs here. The trial court ordered the case added to Judicial Council Coordination Proceeding No. 4042, entitled *In re Tobacco Cases II,* and it certified the class. In March 2002, defendants jointly moved for summary judgment on the ground that the FCLAA preempted the state law on which plaintiffs' complaint was based. Four days later, defendants jointly filed a second motion for summary judgment on the ground that defendants' advertising and marketing practices were protected speech under the First Amendment to the federal Constitution.

In support of their summary judgment motions, defendants filed declarations stating that their advertising appeals to adults as well as to minors, that defendants themselves do not sell cigarettes to consumers, and that defendants have fully complied with federal labeling requirements. In opposition, plaintiffs submitted declarations asserting that defendants' advertising and promotions deliberately targeted minors, and they attached copies of defendants' advertisements.

The trial court granted both of defendants' summary judgment motions and entered **110 judgment for defendants. Plaintiffs appealed.

On the preemption issue, the Court of Appeal recognized that our decision in *Mangini, supra,* 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73, was directly on point. The Court of Appeal concluded, however, that *Mangini* had been superseded by the United States Supreme Court's decision in *Lorillard, supra,* 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532. Relying on *Lorillard,* the Court of Appeal affirmed the summary judgment for defendants on the preemption issue, without deciding whether the federal Constitution's First Amendment established an independent ground for sustaining the summary judgment. We granted plaintiffs' petition for review.

A. Introduction

[1][2] As we explained in *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 12 Cal.Rptr.3d 262, 88 P.3d 1, the supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. "[S]tate law that conflicts with federal law is 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407(*Cipollone*), quoting *Maryland v. Louisiana* (1981) 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576.) It is well established that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic***424 police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress,' " and also that " ' "[t]he purpose of Congress is the ultimate touchstone" ' of pre-emption analysis." (*Cipollone,*

supra, at p. 516, 112 S.Ct. 2608; accord, *Lorillard, supra,* 533 U.S. at pp. 541-542, 121 S.Ct. 2404.)

[3] The United States Supreme Court has explained that federal preemption arises in three circumstances: "First, Congress can define explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation] and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one. [¶] Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.... [¶] Finally, state law is pre-empted to the extent that it actually conflicts with federal law." (*English v. General Electric Co.* (1990) 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65; see *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352; *Dowhal v. SmithKline Beecham Consumer Healthcare, supra,* 32 Cal.4th at pp. 923-924, 12 Cal.Rptr.3d 262, 88 P.3d 1.)

Here, we need not consider the second and third forms of preemption because the preemptive scope of the FCLAA "is governed entirely by the express language" of the act. (*Cipollone, supra,* 505 U.S. at p. 517, 112 S.Ct. 2608; see also *Lorillard, supra,* 533 U.S. at p. 541, 121 S.Ct. 2404 ["our task is to identify the domain expressly pre-empted"].)

[4] Defendants here contend that, notwithstanding our decision to the contrary in *Mangini, supra,* 7

Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73, the FCLAA preempts a claim asserted under the state unfair competition law that seeks to impose liability on tobacco companies for advertising and promotional practices that target *1266 minors for the purpose of inducing them to purchase and smoke cigarettes. To evaluate that contention, we first examine specific provisions of federal and state statutes concerning cigarette advertising and minors, then turn to *Mangini* and to the United States Supreme Court's decisions in *Cipollone, supra,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407, and *Lorillard, supra,* 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532.

B. The Federal Cigarette Labeling and Advertising Act (FCLAA)

We summarized the pertinent federal legislation in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, **111 36 Cal.Rptr.3d 814, 124 P.3d 408(*Reynolds*). The FCLAA, which Congress enacted in 1965, prohibits manufacturing, packaging, or importing for sale or distribution any cigarettes whose package fails to bear specified warnings by the Surgeon General. (15 U.S.C. § 1333.) The preemption provision of the 1965 federal act prohibited states from requiring tobacco companies to add to cigarette labels or advertising any statements relating to smoking and health that were not required by federal law. (See Act of July 27, 1965, Pub.L. No. 89-92, § 5, 79 Stat. 283.) In 1969, however, Congress amended the FCLAA to require stronger warnings of the dangers of smoking, to allow the Federal Trade Commission to require warnings in

cigarette advertising, and to prohibit cigarette advertising in "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." (15 U.S.C. § 1335; see *Lorillard, supra,* 533 U.S. at p. 544, ***425 121 S.Ct. 2404.) At the same time, Congress expanded the scope of federal preemption by amending the federal act to provide: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." (15 U.S.C. § 1334(b).)

C. The California Statutes

[5][6] The state unfair competition law (Bus. & Prof.Code, § 17200 et seq.) authorizes civil suits for "unfair competition" (*id.,* § 17204), which it defines to "include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."(*id.,* § 17200). "It governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair business competition.' " (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527.) "By defining unfair competition to include any '*unlawful*... business act or practice' [citation], the [unfair competition law] permits violations of other laws to be treated as unfair competition that is independently actionable." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 119 Cal.Rptr.2d 296, 45 P.3d 243.)

[7] ***1267** Penal Code section 308 prohibits both the sale of tobacco products to any person under the age of 18 and the purchase and possession of tobacco products by any such minor. Violation is a misdemeanor. When first enacted in 1891, Penal Code section 308 prohibited only selling or furnishing tobacco to minors. (Stats.1891, ch. 70, § 1, p. 64.) Subdivision (b), which prohibits the purchase of tobacco by minors, was added in 1988. (Stats.1988, ch. 1045, § 1, pp. 3393-3394.) Penal Code section 308 provides criminal punishment for violators, but it does not expressly authorize civil liability, nor does it expressly refer to advertising of tobacco products.

D. *Cipollone*

The United States Supreme Court's 1992 decision in *Cipollone, supra,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407, was its first decision construing the FCLAA. "The issue there was whether the [FCLAA's] ban on state regulation of *advertising* in [15 U.S.C.] section 1334 preempted state common law actions accusing tobacco companies of failing to warn of the dangers of smoking, of fraudulent advertising, of breaching warranties that asserted that the use of cigarettes had no significant health consequences, and of conspiring to deprive the public of scientific and medical data showing the dangers of tobacco use. In a divided opinion, the high court held that the federal act preempted only the causes of action based on failure to warn of the dangers of tobacco use, but permitted the other causes of action." (*Reynolds, supra,* 37 Cal.4th at p. 721, 36 Cal.Rptr.3d 814, 124 P.3d 408.)

Justice Stevens authored the lead opinion in *Cipollone,* concluding that the FCLAA preempted some, but not all, of the plaintiff's causes of action. Chief Justice Rehnquist, Justice White, and Justice O'Connor joined fully in that opinion. Justice Blackmun wrote a concurring and dissenting opinion, in which Justices Kennedy and Souter joined, asserting there was no evidence of an unambiguous congressional intent to preempt any ****112** common law cause of action. (*Cipollone, supra,* 505 U.S. at p. 531, 112 S.Ct. 2608 (conc. & dis. opn. of Blackmun, J.).) Although he joined in parts I through IV of Justice Stevens's lead opinion, Justice Blackmun dissented from that opinion's parts V and VI, in *****426** which Justice Stevens explained why the FCLAA preempted some common law claims but not others. (505 U.S. at p. 531, 112 S.Ct. 2608.) In another concurring and dissenting opinion, Justice Scalia, joined by Justice Thomas, took the opposite view, that the FCLAA preempted all of the common law causes of action. (505 U.S. at p. 544, 112 S.Ct. 2608 (conc. & dis. opn. of Scalia, J.).) Justice Scalia did not join in any part of Justice Stevens's opinion.[2]

***1268** In *Cipollone,* the high court noted that in the FCLAA's 1965 preemption provision "Congress spoke precisely and narrowly" (*Cipollone, supra,* 505 U.S. at p. 518, 112 S.Ct. 2608), but that "the plain language of the pre-emption provision in the 1969 Act is much

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[2] Because seven justices joined in parts I through IV of Justice Stevens's opinion, we attribute the analysis and conclusions in those parts to the high court. Because only four justices joined in parts V and VI of Justice Stevens's opinion, we refer to those parts as a plurality opinion or a plurality analysis.

broader"(*id.* at p. 520, 112 S.Ct. 2608). The *Cipollone* plurality set forth an analysis to be used to determine whether, as amended in 1969, the FCLAA preempts a common law cause of action. "The central inquiry in each case," Justice Stevens wrote, "is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion,' giving that clause a fair but narrow reading." (*Cipollone, supra,* 505 U.S. at pp. 523-524, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).) The plurality then applied that analysis to the common law claims at issue there, which were based on New Jersey law, for failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts.

To support the claim for failure to warn, the plaintiff in *Cipollone* had asserted two related theories: "first, that [the defendant tobacco companies] 'were negligent in the manner [that] they tested, researched, sold, promoted, and advertised' their cigarettes; and second, that [the tobacco companies] failed to provide 'adequate warnings of the health consequences of cigarette smoking.' " (*Cipollone, supra,* 505 U.S. at p. 524, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).) The plurality reasoned that because the FCLAA preempts common law claims "to the extent that they rely on a state-law 'requirement or prohibition ... with respect to ... advertising or promotion,' " it preempted the plaintiff's failure-to-warn claim, under either theory, insofar as it

asserted that the tobacco companies' "post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." (*Cipollone, supra,* at p. 524, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).) The FCLAA did not preempt the failure-to-warn claim, however, insofar as that claim relied "solely on [the tobacco companies'] testing or research practices or other actions unrelated to advertising or promotion." (*Cipollone, supra,* at pp. 524-525, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).)

The *Cipollone* plurality concluded that the FCLAA did not preempt the claim for breach of express warranty because any requirements enforced through that claim were not imposed under state law but instead had been voluntarily untaken by the party issuing the warranty. "In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement ...*imposed under State law* ' within the meaning of § 5(b) [of the FCLAA]." (*Cipollone,****427** *supra,* 505 U.S. at p. 526, 112 S.Ct. 2608 (plur. opn. of Stevens, J.), fn. omitted.)

The plaintiff in *Cipollone* had alleged two theories of fraudulent misrepresentation. The *Cipollone* plurality concluded that the FCLAA preempted the ***1269** claim under the first theory, which was that the defendant tobacco companies, "through their advertising, neutralized the effect of federally mandated warning labels," because that theory was "predicated on a state-law prohibition against statements in advertising and promotional ****113** materials that tend to minimize the health hazards

associated with smoking." (*Cipollone, supra,* 505 U.S. at p. 527, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).) But the *Cipollone* plurality concluded that the FCLAA did not preempt the claim under the second theory, which was that the defendant tobacco companies had falsely represented material facts, because that theory was "predicated not on a duty 'based on smoking and health' but rather on a more general obligation-the duty not to deceive." (*Id.* at pp. 528-529, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).)

For similar reasons, the *Cipollone* plurality concluded that the FCLAA did not preempt the claim for conspiracy to misrepresent or conceal material facts concerning the health hazards of smoking, because "[t]he predicate duty underlying this claim is a duty not to conspire to commit fraud," which was "not a prohibition 'based on smoking and health' as that phrase is properly construed." (*Cipollone, supra,* 505 U.S. at p. 530, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).)

E. *Mangini*

In *Mangini,* which we decided in 1994, the plaintiff sued R.J. Reynolds under the state unfair competition law, claiming that its advertising campaign for Camel cigarettes, featuring a cartoon character called Old Joe Camel, improperly targeted minors. After reviewing the United States Supreme Court decision in *Cipollone, supra,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407, decided two years earlier, we concluded that the plaintiff's claims were not preempted. (*Mangini, supra,* 7 Cal.4th at p. 1073, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

The state unfair competition law claim, we reasoned, was analogous to the common law claims for conspiracy and misrepresentation that the high court in *Cipollone, supra,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407, had held were not preempted by the FCLAA. (*Mangini, supra,* 7 Cal.4th at pp. 1068-1069, 31 Cal.Rptr.2d 358, 875 P.2d 73.) Under the reasoning of the *Cipollone* plurality, we observed, whether the FCLAA preempts a cause of action depended upon whether "the predicate legal duty" underlying that cause of action was " 'based on smoking and health.' " (*Mangini, supra,* at p. 1068, 31 Cal.Rptr.2d 358, 875 P.2d 73.) Applying that test to the plaintiff's action in *Mangini,* we concluded: "The predicate duty [under the state unfair competition law] is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law. In *Cipollone,* the predicate duty-not to deceive-was not 'based on smoking and health'; this one is similarly not." (*Id.* at p. 1069, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

Our decision in *Mangini* also examined Penal Code section 308, which prohibits the sale of tobacco to minors and the purchase of tobacco by ***1270** minors. We observed that this statutory prohibition was originally enacted in 1891, long before concerns about the effect of smoking on health arose, and was apparently intended to protect minors from immoral activities. (*Mangini, supra,* 7 Cal.4th at p. 1070, 31 ***428** Cal.Rptr.2d 358, 875 P.2d 73.) It is part of a chapter of the Penal Code containing offenses " against good morals," and it is immediately followed

by prohibitions against admitting a minor to a house of prostitution (Pen.Code, § 309) or to a prize fight or cockfight (*id.*, § 310). (*Mangini, supra,* at p. 1070, 31 Cal.Rptr.2d 358, 875 P.2d 73.) We concluded: "[T]he state's protective role, and not primarily health concerns, motivated the prohibition against selling cigarettes to minors." (*Ibid.*)

F. *Lorillard*

Acting under the authority of a state statute banning unfair or deceptive trade practices, and intending to fill gaps in the master settlement agreement that terminated the action brought by the 50 state attorneys general (see *ante,* 63 Cal.Rptr.3d at p. 422, 163 P.3d at pp. 108-109), the Massachusetts Attorney General in January 1999 issued regulations that, among other things, barred outdoor advertising of cigarettes within 1,000 feet of any school, park, or playground. (*Lorillard, supra,* 533 U.S. at pp. 532-535, 121 S.Ct. 2404.) The United States Supreme Court in 2001 held that the FCLAA preempted the Massachusetts regulations. (*Lorillard, supra,* at p. 548, 121 S.Ct. 2404.) Justice O'Connor wrote the majority opinion, **114 in which Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy joined. Justice Stevens authored a dissenting opinion, in which Justices Souter, Ginsberg, and Breyer joined.

In *Lorillard,* the high court rejected the Massachusetts Attorney General's contention that the state regulations were "not 'based on smoking and health,' because they do not involve health-

related content in cigarette advertising but instead target youth exposure to cigarette advertising." (*Lorillard, supra,* 533 U.S. at p. 547, 121 S.Ct. 2404.) The court noted that Congress in the FCLAA had "sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising" and for that reason had "banned electronic media advertising of cigarettes" and had vested the Federal Trade Commission with authority to regulate cigarette advertising. (*Lorillard, supra,* at p. 548, 121 S.Ct. 2404.) Observing that the Massachusetts Attorney General's attempt "to address the incidence of underage cigarette smoking by regulating advertising" was similar to the FCLAA's "ban on cigarette advertising in electronic media," the court concluded: "At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected." (*Lorillard, supra,* at p. 548, 121 S.Ct. 2404.)

The high court in *Lorillard* also rejected the argument that federal preemption was limited to cigarette advertising's content, not its location: ***1271** "[T]he content/location distinction cannot be squared with the language of the pre-emption provision, which reaches *all* 'requirements' and 'prohibitions' 'imposed under State law.' A distinction between the content of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic

media, but not elsewhere." (*Lorillard, supra,* 533 U.S. at pp. 548-549, 121 S.Ct. 2404.)

The high court summarized its conclusions: "[W]e fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns. ***429 We also conclude that a distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation in the text of the pre-emption provision. Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. Accordingly, we hold that the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA." (*Lorillard, supra,* 533 U.S. at pp. 550-551, 121 S.Ct. 2404.)

The high court cautioned, however, that the FCLAA did not preempt "generally applicable zoning restrictions" and that "[r]estrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision." (*Lorillard, supra,* 533 U.S. at pp. 551-552, 121 S.Ct. 2404.) Nor does the FCLAA preempt "state laws prohibiting cigarette sales to minors" or state prohibitions on

"common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." (*Lorillard, supra,* at p. 552, 121 S.Ct. 2404.)

G. Analysis

Plaintiffs argue that their claim is indistinguishable from the fraud claim at issue in *Cipollone, supra,* 505 U.S. 504, 112 S.Ct. 2608, which the United States Supreme Court held was not preempted by the FCLAA. They maintain that both the state unfair competition law, on which their claim is based, and the common law prohibition on fraud, on which one of the claims at issue in *Cipollone* was based, are laws of general application not motivated by concerns about smoking and health. But the *Cipollone* plurality did not conclude that, to avoid FCLAA **115 preemption, it was sufficient that a state law claim be based on a law of general application not predicated on concerns about smoking and health. Rather, the plurality there considered each common law theory to determine whether, *as applied in the particular case,* the claim based on that *1272 theory would impose a duty based on concerns about smoking and health. (*Cipollone, supra,* 505 U.S. at pp. 523-530, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).) The fraud claim in *Cipollone* sought to regulate cigarette advertising on the basis that it contained false assertions of fact-a content-neutral basis-and the claim sought to impose a duty-the duty not to deceive-that was broader and more general than concerns about smoking and health. (*Id.* at pp. 528-529, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).)

The *Cipollone* plurality concluded that the FCLAA did preempt other common law claims insofar as they sought to impose duties on cigarette advertisers based on concerns about smoking and health. (*Cipollone, supra,* 505 U.S. at pp. 523-530, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).) Thus, the plurality concluded that the FCLAA preempted the plaintiff's failure-to-warn and fraudulent misrepresentation claims to the extent they sought to impose restrictions, based on concerns about smoking and health, on the content of cigarette advertising. (*Cipollone, supra,* at pp. 524, 527-529, 112 S.Ct. 2608 (plur. opn. of Stevens, J.).)

Likewise in *Lorillard, supra,* 533 U.S. 525, 121 S.Ct. 2404, the United States Supreme Court stated that the FCLAA did not preempt general zoning regulations that "apply to cigarettes on equal terms with other products"(*Lorillard, supra,* 533 U.S. at p. 552, 121 S.Ct. 2404), but also that the FCLAA did preempt the regulations***430 at issue there, which applied only to cigarettes and were based on concerns about youth smoking, because the court concluded that those concerns were indistinguishable from the concern about cigarette smoking and health (*Lorillard, supra,* at p. 548, 121 S.Ct. 2404).

Accordingly, it is not sufficient to consider here whether plaintiffs have based their claim on a law of general application that is not motivated by concerns about smoking and health. (See *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 ["there is little reason why

state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute"].) Rather, we must also determine whether plaintiffs seek, by a particularized application of a general law, to restrict the content or location of cigarette advertising based on concerns about youth smoking, concerns that cannot be distinguished from concerns about smoking and health.

[8] The state unfair competition law is a law of general application, and it is not based on concerns about smoking and health. Therefore, the FCLAA does not preempt that law *on its face;* nor would the FCLAA preempt a claim under that law that sought to impose only content-neutral restrictions on cigarette advertising-such as a requirement that the advertising not contain false statements of fact-that were unrelated to concerns about smoking and ***1273** health. To the extent we so concluded in *Mangini, supra,* 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73, we were correct, and we reaffirm those conclusions.

[9] Here, however, as in *Mangini,* plaintiffs' claim is based not only on the state unfair competition law but also on Penal Code section 308, which prohibits sales of tobacco products to minors and possession of tobacco products by minors. The purpose of Penal Code section 308 is to prevent minors from smoking or otherwise using tobacco products. Although we observed in *Mangini* that when enacted in 1891 Penal Code section 308 was not based on health concerns, but rather on concerns about immoral

activities (*Mangini, supra,* 7 Cal.4th at p. 1070, 31 Cal.Rptr.2d 358, 875 P.2d 73), the legislative history of recent amendments to that statute shows that it is now unquestionably based in large part, if not entirely, on health concerns. (See, e.g., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1849 (1995-1996 Reg. Sess.) as amended Aug. 26, 1996, pp. 3-4 [detailing major health problems caused by youth smoking as justification for stiffening penalties for minor purchases]; Sen. Com. on ****116** Public Safety, Analysis of Sen. Bill No. 757 (2001-2002 Reg. Sess.) as introduced Feb. 23, 2001 [detailing health risks in support of stiffening enforcement of Pen.Code, § 308].) Indeed, the former State Department of Health Services sponsored the 2001 amendment to Penal Code section 308 (Stats.2001, ch. 376, § 4), and its deputy director wrote, in a letter to the Chair of the Assembly Committee on Governmental Organization urging passage of the amending legislation, that "[p]reventing youth tobacco use is a major public health concern." (Deputy Director Terri Delgadillo, letter to Assemblyman Herb Wesson, June 25, 2001.) And the United States Supreme Court has concluded, in an opinion that is binding on this court, that concerns about youth smoking are inherently intertwined with, and cannot validly be distinguished from, concerns about smoking and health. (*Lorillard, supra,* 533 U.S. at p. 548, 121 S.Ct. 2404.)

Plaintiffs' unfair competition claim here seeks to impose on defendant tobacco companies***431 a duty not to advertise in a way that could encourage minors to smoke. That is precisely the duty that the

United States Supreme Court in *Lorillard, supra,* 533 U.S. 525, 121 S.Ct. 2404, held subject to FCLAA preemption because it is necessarily and inherently based on concerns about smoking and health. Accordingly, plaintiffs' unfair competition claim is preempted, unless it falls within an exception to FCLAA preemption.

[10] Plaintiffs contend that even if the FCLAA otherwise preempts their cause of action, it falls within an exception allowing states to prohibit conduct that constitutes an inchoate crime. In *Lorillard,* after observing that the FCLAA does not preempt state laws prohibiting sales to minors, the high court added: "Having prohibited the sale and distribution of tobacco products to minors, *1274 the State may prohibit inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." (*Lorillard, supra,* 533 U.S. at p. 552, 121 S.Ct. 2404.)

In stating in *Lorillard* that the FCLAA does not preempt state prohibitions on cigarette sales to minors or common inchoate offenses that attach to criminal conduct, the United States Supreme Court cannot have meant to include restrictions and regulations on the content and location of cigarette advertising, at least when, as here, there is no allegation that the advertisements directly and expressly incited criminal violations. The purpose underlying FCLAA preemption would be severely undermined if states could invoke the inchoate crime exception on the ground that cigarette advertising,

because of its content or location, was intentionally designed to encourage youth smoking.

In addition, the First Amendment to the United States Constitution limits a state's power to treat speech as criminal. Here, plaintiffs contend that defendant tobacco companies aided and abetted unlawful sales of cigarettes to minors, in violation of Penal Code section 308, because they intentionally used advertising and marketing techniques that target minors, thereby encouraging and facilitating illegal transactions.[3] Defendants contend, however, that when the alleged aiding and abetting consists of speech, the First Amendment to the United States Constitution severely limits accomplice liability.

[11][12] Cigarette advertising is commercial speech, and the United States Supreme Court established the principles governing First Amendment protection of commercial speech in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(*Central Hudson*). (See *Lorillard, supra,* 533 U.S. at pp. 561-568, 121 S.Ct. 2404.) "For commercial speech to come within [the First Amendment's protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield

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[3] Because the California statute prohibiting "solicitation" is limited to certain enumerated felonies (see Pen.Code, § 653f, subd. (a)), and a violation of Penal Code section 308 is a misdemeanor, plaintiffs do not contend that defendants' conduct constituted the inchoate crime of soliciting the sale or use of cigarettes in violation of Penal Code section 308.

positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is **117 necessary to serve that interest." (*Central Hudson, supra,* at p. 566, 100 S.Ct. 2343.)

The first three components of the *Central Hudson* test present no controversy here. Defendants' cigarette advertising concerns lawful activity because it is addressed***432 to adults who can legally purchase and use cigarettes, and not exclusively to minors who cannot, and plaintiffs have not alleged that it is *1275 misleading. As defendants acknowledge, California has a substantial interest in discouraging the sale of cigarettes to minors and the use of cigarettes by minors. Restricting advertising that has the effect of encouraging minors to smoke would directly advance that interest.

[13] Thus, we arrive at the fourth component of the *Central Hudson* test, whether the state regulation "is not more extensive than is necessary to serve [the state's] interest." (*Central Hudson, supra,* 447 U.S. at p. 566, 100 S.Ct. 2343.) As we have explained: "The court has clarified that the last part of the test-determining whether the regulation is not more extensive than 'necessary'-does not require the government to adopt the least restrictive means, but instead requires only a 'reasonable fit' between the government's purpose and the means chosen to achieve it." (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at p. 952, 119 Cal.Rptr.2d 296, 45 P.3d 243, citing *Board*

of Trustees, State Univ. of N.Y. v. Fox (1989) 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388.)

Here, treating defendants' conduct in advertising their cigarettes as aiding and abetting a violation of Penal Code section 308, and thereby rendering defendants subject to criminal prosecution whenever a minor acquires the cigarettes they marketed, is not a "reasonable fit" with the state's purpose of discouraging smoking by minors. California has, and has employed, many other means of carrying out its policy of discouraging minors from smoking, such as prosecuting retailers who sell cigarettes to minors, taxation to raise the price of cigarettes, advertising and other publicity about the dangers of smoking, and legal actions to restrict the distribution of cigarettes in places where minors are present. (See *Reynolds, supra,* 37 Cal.4th 707, 36 Cal.Rptr.3d 814, 124 P.3d 408.) Through the state Attorney General, California has brought suit under the state unfair competition law to enjoin defendants from targeting minors in their advertising, and it has secured a settlement in which defendants agreed to refrain from such advertising. It has filed actions to enforce that settlement. (See, e.g., *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., supra,* 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317.) Such remedies focus properly on smoking by minors as an overall problem, instead of inquiring into which tobacco company may have encouraged a particular minor to smoke a particular brand of cigarette.

We therefore conclude that the free speech guarantee of the federal Constitution's First Amendment does

not permit defendants' cigarette advertising to be treated as the aiding and abetting of a criminal offense. Consequently, plaintiffs cannot escape the FCLAA's preemptive force by claiming that defendants' conduct constituted an inchoate criminal offense.

We summarize: Plaintiffs' cause of action against defendant tobacco companies is based on two laws: Penal Code section 308 (which does not ***1276** itself regulate advertising but is based on concerns about smoking and health) and the state unfair competition law (which does regulate advertising but is not itself based on concerns about smoking and health). By combining these two laws in a single claim, plaintiffs seek to regulate cigarette advertising on the ground that it targets minors and encourages them to begin smoking. As the United States Supreme Court made clear in *Lorillard, supra,* 533 U.S. 525, 121 S.Ct. 2404, the FCLAA preempts any state law or cause of action that seeks to regulate cigarette advertising on that basis. To the extent it concluded otherwise, our opinion in *Mangini, supra,* 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73, has been superseded by the high court's later decision in *Lorillard,* and *Mangini* is therefore overruled.

The judgment of the Court of Appeal is affirmed.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, MORENO, and CORRIGAN, JJ.

106 P.3d 304, 24 Cal.Rptr.3d 865

Supreme Court of California
TOBACCO CASES II, JCCP 4042
No. S129522.
Feb. 16, 2005.

Prior report: Cal.App., 20 Cal.Rptr.3d 693.

Petition for review granted.

GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, CHIN, BROWN, and MORENO, JJ., concur.

Cal.App. 4 Dist.,2004.

Court of Appeal, Fourth District, Division 1, California.
In re TOBACCO CASES II, JCCP 4042.
No. D041356.

Oct. 6, 2004.
Rehearing Denied Oct. 27, 2004.
Review Granted Feb. 16, 2005.

Blumenthal & Markham, Norman B. Blumenthal, San Diego, David R. Markham, Kyle R. Nordrehaug; Thorsnes, Bartolotta & McGuire, Vincent J. Bartolotta, Jr., John F. McGuire, Karen Frostrom; Chavez & Gertler, Mark A. Chavez, Mill *697 Valley; and Thomas E. Sharkey, San Diego, for Plaintiff and Appellant.

Bill Lockyer, Attorney General, William N. Brieger, Acting Chief Assistant Attorney General, Dennis Eckhart and Herschel T. Elkins, Assistant Attorneys General, Ronald Reiter, Seth E. Mermin and Alan Lieberman, Deputy Attorneys General, as Amicus Curiae on behalf of Plaintiffs and Appellants.

Munger, Tolles & Olson, Gregory P. Stone, Daniel P. Collins, Steven B. Weisburd, Los Angeles; Seltzer CaplanMcMahon Vitek, Gerald L. McMahon and Daniel E. Eaton, San Diego, for Defendant and Respondent Philip Morris USA Inc.

Gray Cary Ware & Freidenrich, William S. Boggs and Brian A. Foster, San Diego, for Defendant and Respondent Lorillard Tobacco Company.

Howard, Rice, Nemerovsky, Canady, Falk & Rabkin, H. Joseph Escher III, San Francisco, Todd E. Thompson; Jones, Day, Reavis & Pogue and William T. Plesec for Defendant and Respondent R.J. Reynolds Tobacco Company.

Sedgwick Detert Moran & Arnold and Steven D. DiSaia for Defendant and Respondent Brown & Williamson Tobacco Corp.

McDONALD, J.

The representative plaintiffs in this class action asserting claims under California's unfair competition law (Bus. & Prof.Code, § 17200 et seq. (UCL)) appeal a summary judgment in favor of defendant tobacco companies Philip Morris Incorporated (Philip Morris), R.J. Reynolds Tobacco Company (R.J. Reynolds), Lorillard Tobacco Company, and Brown & Williamson Tobacco Corporation.[1] The summary judgment is based on the granting of two separate motions for summary judgment brought jointly by defendants-one based on federal preemption under the Federal Cigarette Labeling and Advertising Act, 15 United States Code section 1331 et seq., (FCLAA) and the other based on

[1] The court certified the case as a class action after ordering it added to Judicial Council Coordination Proceeding No. 4042, entitled "In re Tobacco Cases II." The representative plaintiffs named in the second amended complaint (the operative pleading) are Devin Daniels, Bryce Clements, Daimon Fullerton and Nicole Morrow. At some point in the proceedings, Maren Beth Sandler, by and through her guardian ad litem Kay Steele Sandler, was added as a representative plaintiff.

the protection afforded commercial speech by the First Amendment of the United States Constitution and article I, section 2 of the California Constitution. Plaintiffs contend the court erred by (1) ruling all of their claims are preempted by the FCLAA; (2) ruling defendants' activities were protected by the First Amendment; and (3) denying plaintiffs' motion for "relief from proceedings" under Code of Civil Procedure section 473 that sought consideration of evidence identifying specific perpetrators of illegal sales in connection with their claim that defendants aided and abetted illegal sales of cigarettes to minors. Alternatively, plaintiffs contend they should be given leave to amend their complaint because the summary judgment motions were effectively motions for judgment on the pleadings.[2] We affirm the judgment on the grounds of FCLAA preemption and insufficient evidence to raise a triable issue ***698** of fact as to the only nonpreempted claim put in issue by plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

This action was filed as a class action on behalf of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994, and December 31, 1999." Plaintiffs' second amended complaint (the

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[2] The Attorney General filed an amicus curiae brief in support of plaintiffs, arguing the trial court misconstrued the standard for determining whether state-law regulation of advertising and promotion of tobacco products is preempted by the FCLAA and incorrectly held the First Amendment forecloses all of plaintiffs' claims.

complaint) sought restitutionary and injunctive relief under two causes of action, one for unlawful or deceptive business practices in violation of the UCL and one for untrue or misleading advertising in violation of Business and Professions Code section 17500 et seq.[3] The court certified the case as a class action.[4]

The complaint alleges: "This case arises from a scheme involving [d]efendants' systematic advertising efforts which appeal not only to adults, but also to children under the age of 18.... Defendants' scheme was to market cigarettes for consumption to California consumers, *including minors below 18.*" According to the complaint,

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[3] Plaintiffs voluntarily dismissed a third cause of action for unjust enrichment. They also elected to forego injunctive relief and seek only restitution.

[4] The court's class certification order appears to certify the class only as to plaintiffs' cause of action under the UCL, and defendants assumed this to be the case in their motion for summary judgment, stating: "Plaintiffs' Complaint also includes a non-certified claim under [Business and Professions Code section] 17500. Because that non-class claim is preempted for the same reasons as Plaintiffs' § 17200 claim, Defendants are entitled to summary judgment." However, the court's final summary judgment rulings suggest the court viewed the class certification to include both causes of action. The court stated: "The Complaint states two causes of action under Business & Professions Code sections 17200 et seq. and 17500 et seq. (the 'Unfair Competition Law' or 'UCL') that were certified for class action." Accordingly, we view the court's summary judgment rulings that "[p]laintiffs' *UCL case* does not withstand First Amendment scrutiny and therefore must be dismissed[,]" and that "[p]laintiffs' *UCL claims* are either preempted ... or are based on inadmissible evidence" as disposing of both causes of action. (Italics added.)

defendants have concealed internal research showing tobacco causes cancer and other diseases and have repeatedly told the public nicotine is not addictive despite knowing it is highly addictive. To prevent a precipitous decline in cigarette sales resulting from smoking-related deaths, defendants make children and teenagers the main target of "deceptive acts, including unfair and deceptive marketing programs and advertising." As a result, over 3,000 children begin smoking every day. Eighty-two percent of adults who have ever smoked had their first cigarette before age 18, and more than half became regular smokers before that age. Tobacco use by minors continues to increase. Defendants have intentionally promoted youth cigarette smoking by designing marketing and advertising campaigns intended to appeal to minors (while proclaiming they are not targeting minors); placing tobacco advertisements near schools and playgrounds and in youth-oriented publications; distributing logos and characters on promotional items like T-shirts and baseball caps directly to minors or in areas frequented by minors; advertising in video arcades; sponsoring events likely to attract youth interest; and paying for the promotion of their products in movies that appeal to young people. By advertising in magazines read by minors, defendants have willfully set in motion a chain of distribution illegal under Penal Code section 308, which prohibits the sale of tobacco to minors under the age of 18. ***699** Defendants never warned class members or any other California consumer that cigarettes are highly addictive.[5]

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[5] In their opposition to defendants' summary judgment motions (but not in their complaint), plaintiffs claimed defendants

Defendants jointly filed two separate motions for summary judgment, one based on federal preemption under the FCLAA and the other based on the First Amendment. The court issued telephonic rulings granting both motions. Plaintiffs requested oral argument and filed a "motion for relief from proceedings pursuant to [Code of Civil Procedure section 473, subdivision (b)]" seeking "relief from the ... rulings granting summary judgment to Defendants insofar as those rulings were based on an alleged lack of evidence that Penal Code [section] 308 was violated during the class period." After hearing oral argument on the summary judgment motions, the court denied plaintiffs' motion for relief under Code of Civil Procedure section 473, issued a final ruling granting the summary judgment motions, and entered final judgment in favor of defendants.

DISCUSSION

I

Request for Judicial Notice

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market "light" cigarettes with knowledge that the description was false because smokers ingest as much tar and nicotine from those cigarettes as from other cigarettes. Although the trial court addressed this issue in its summary judgment rulings, plaintiffs have not raised it in their opening brief. Consequently, we deem the issue waived or abandoned on appeal. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457.)

Defendants ask us to judicially notice four federal district court orders[6] and plaintiffs' opposition to the petition they filed in the California Supreme Court seeking review of this court's denial of their petition for writ of mandate challenging the trial court's class certification ruling. Plaintiffs have not opposed defendants' request for judicial notice.

"Although a court may judicially notice a variety of matters (Evid.Code, § 450 et seq.), only *relevant* material may be noticed." (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73(*Mangini*).) If a document is relevant and subject to judicial notice, notice is taken of its existence but not of the truth of any matters asserted in it. (*Ibid.*) Although we may take judicial notice of materials not before the trial court, including records of another court (Evid.Code, §§ 459, subd. (a), 452, subd. (d)), we need not give effect to that evidence. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 151 Cal.Rptr. 837, 588 P.2d 1261.)

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[6] The federal district court orders are: (1) the order denying plaintiff's motion to remand and retaining jurisdiction in *Cannata v. Philip Morris et al.* (C.D.Cal. Dec. 11, 2002, No. CV-02-8026-ABC); (2) the order granting defendants' motion to dismiss in *Harshberger v. Philip Morris, Inc. et al.* (N.D. Cal. April 1, 2003, No. 02-05267-JSW); (3) the order denying plaintiffs' motion for leave to file a second amended complaint in *Newton v. R.J. Reynolds Tobacco Company et al.* (N.D.Cal.2003, No. C-02-1415-VRW) and (4) the order denying plaintiffs' request for remand in *Rodarte v. Philip Morris Inc. et al.* (C.D. Cal. April 21, 2003, No. CV-03-0353-FMC)

The opposition brief plaintiffs filed with the California Supreme Court is subject to judicial notice as a record of that court (Evid.Code, § 452, subd. (d)) and is relevant to defendants' argument that their summary judgment motions addressed all of the issues raised by plaintiffs' complaint. The four federal court orders in question are subject to judicial notice as court records (*Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* (1997) 58 Cal.App.4th 1261, ***700** 68 Cal.Rptr.2d 532) and as federal decisional law (Evid.Code, § 451, subd. (a); *Mangini v. R.J. Reynolds Tobacco Co., supra,* 7 Cal.4th at p. 1064, 31 Cal.Rptr.2d 358, 875 P.2d 73). The first, second and fourth orders (attached to the request for judicial notice as exhibits B, C and E, respectively) are relevant to defendants' argument that statutory immunity bars plaintiffs' fraud-based claim that defendants falsely denied smoking was addictive. The third order (exhibit D) is relevant to defendants' preemption argument. All four orders are cited in defendants' respondents' brief. Because the materials defendants ask us to judicially notice are relevant and subject to judicial notice, we grant defendants' request for judicial notice.[7]

II

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[7] The copies of the second and third orders attached to defendants' request for judicial notice are not file-stamped or signed and the third order bears no date. However, because defense counsel in a declaration supporting the request for judicial notice represents that they are true and correct copies of the respective court decisions and plaintiffs have not opposed the request for judicial notice, we accept counsel's representation.

Summary Judgment Standards

Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 107 Cal.Rptr.2d 841, 24 P.3d 493.) A summary judgment motion must be directed to the issues raised by the pleadings, and the papers filed in opposition to the motion may not create issues outside the pleadings or operate as a substitute for an amendment to the pleadings. (*Nash v. Fifth Amendment* (1991) 228 Cal.App.3d 1106, 279 Cal.Rptr. 465.) A defendant moving for summary judgment is not required to refute liability on some theory not included in the pleadings. (*Ibid.*)

On appeal from a ruling granting summary judgment, we conduct an independent review of the moving and opposition papers and apply the same standards as the trial court to determine whether the motion was properly granted. We are not bound by the trial court's stated reasons for its ruling on the motion; we review only the ruling and not its rationale. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 60 Cal.Rptr.2d 830.) Although summary judgment rulings are reviewed de novo, the trial court's evidentiary rulings on a summary judgment motion are reviewed for abuse of discretion.

(*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 121 Cal.Rptr.2d 79; *Beane v. Paulsen* (1993) 21 Cal.App.4th 89, 26 Cal.Rptr.2d 486; *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 273 Cal.Rptr. 214.

III

Preemption

Plaintiffs contend the trial court erroneously ruled that plaintiffs' UCL claims are preempted by the FCLAA. "Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in ***701** the legislative field. [Citation.] When, however, Congress considers the issue of preemption and adopts a preemption [provision in a] statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption [provision] and not by the substantive provisions of the legislation. [Citation.] The reason is that 'Congress' enactment of a provision defining the pre-emptive reach of a statute implies that ma' ers beyond that reach are not pre-empted.' [Citation.]" (*Lindsey v. Tacoma-Pierce County Health Dept.* (9th Cir.1999) 195 F.3d 1065, citing *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407(*Cipollone*).)

The FCLAA is "a comprehensive federal scheme governing the advertising and promotion of cigarettes." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532(*Reilly*).) The purposes of the FCLAA are (1) to adequately inform the public about the adverse health effects of cigarette smoking, and (2) to protect the national economy from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." (15 U.S.C. § 1331; *Cipollone, supra,* 505 U.S. at p. 514, 112 S.Ct. 2608.) Congress vested the authority to regulate cigarette advertising in the Federal Trade Commission (FTC). (*Reilly, supra,* 533 U.S. at pp. 545-546, 548, 121 S.Ct. 2404.)

The FCLAA contains the following preemption provision: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this chapter." (15 U.S.C. § 1334(b)) (hereafter section 1334(b).)[8] Because section 1334(b) explicitly addresses preemption and provides a reliable statement of Congress's intent, the federal preemption issue in this case is governed by the express language of section 1334(b). (*Cipollone, supra,* 505 U.S. at p. 517, 112 S.Ct. 2608.)

Cipollone

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[8] Section 1334(a) provides: "No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package."

The plaintiff in *Cipollone* continued an action filed by his deceased parents against three tobacco companies. The complaint alleged the mother developed lung cancer because she smoked cigarettes manufactured and sold by the defendants. (*Cipollone, supra,* 505 U.S. at p. 509, 112 S.Ct. 2608.) The plurality in *Cipollone* rejected the argument that the phrase "requirement or prohibition ... imposed under State law" in section 1334(b) limits the scope of FCLAA preemption to positive enactments by state legislatures and agencies. (*Cipollone,* at p. 522, 112 S.Ct. 2608.) The plurality noted: "The phrase ... sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." (*Id.* at p. 521, 112 S.Ct. 2608.) The plurality further noted that the phrase "state law" includes common law as well as statutes and regulations. (*Id.* at p. 522, 112 S.Ct. 2608.)

However, section 1334(b) does not preempt all common law claims. (*Cipollone, supra,* 505 U.S. at p. 522, 112 S.Ct. 2608.) Under *Cipollone,* a state law claim is preempted only if "the legal duty that is the predicate of the [claim] constitutes a 'requirement or prohibition based on ***702** smoking and health ... imposed under State law with respect to ... advertising or promotion,' giving that clause a fair but narrow reading." (*Id.* at pp. 523-524, 112 S.Ct. 2608.) "The appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the

imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." (*Id.* at p. 525, 112 S.Ct. 2608.)

The *Cipollone* plurality separately considered each of the common law claims asserted by the plaintiff in that case to determine whether it was preempted. (*Cipollone, supra,* 505 U.S. at p. 523, 112 S.Ct. 2608.) The plurality concluded the plaintiff's failure-to-warn claims were preempted to the extent they required a showing that the defendants' advertising or promotions should have included additional or more clearly-stated warnings. (*Id.* at p. 524, 112 S.Ct. 2608.) However, plaintiff's claims that relied "solely on [the tobacco companies'] testing or research practices or other actions *unrelated to advertising or promotion* " were not preempted. (*Id.* at pp. 524-525, 112 S.Ct. 2608, italics added.)

The *Cipollone* plurality decided a fraudulent misrepresentation claim alleging the tobacco companies neutralized the effect of federally mandated warning labels through their advertising was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition,* however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." (*Cipollone, supra,* 505 U.S. at p. 527, 112 S.Ct. 2608.) The plurality concluded this theory of fraudulent misrepresentation was "inextricably related" to the plaintiff's "failure-to-warn theory,"

which the plurality concluded was "largely pre-empted by [section 1334(b)]." (*Id.* at p. 528, 112 S.Ct. 2608.) The *Cipollone* plurality noted that because section 1334(b) preempted only state law obligations with respect to the advertising or promotion of cigarettes, claims that the tobacco companies concealed material facts were not preempted "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication *other than advertising or promotion.*" (*Cipollone, supra,* at p. 528, 112 S.Ct. 2608.)

The plurality concluded claims based on allegedly false statements of material fact made in advertising were not preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation-the duty not to deceive." (*Cipollone, supra,* 505 U.S. at pp. 528-529, 112 S.Ct. 2608.) The plurality stated: "State-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards. Unlike state-law obligations concerning the warning necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." (*Id.* at p. 529, 112 S.Ct. 2608.)

Mangini

In *Mangini, supra,* 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73, the plaintiff claimed defendant R.J. Reynolds Tobacco Company and others violated the UCL by using a cartoon character called Old Joe Camel in its advertising to attract teenage smokers. (*Id.* at p. 1060, 31 Cal.Rptr.2d 358, 875 P.2d 73.) Reviewing the Court of ***703** Appeal's reversal of the trial court's grant of summary judgment on that claim, the California Supreme Court considered the "narrow issue [of] whether, notwithstanding [California's] prohibition against *sale* [of cigarettes to minors], attempts in California to regulate or prohibit *advertisement* of cigarettes to minors are preempted by federal law." (*Id.* at p. 1065, 31 Cal.Rptr.2d 358, 875 P.2d 73.) Finding the UCL claim clearly sought to impose a prohibition under state law with respect to advertising or promoting cigarettes, *Mangini* stated: "The entire issue thus comes down to this: Is the predicate legal duty 'based on smoking and health' as that phrase was construed in *Cipollone*? We answer that it is not." (*Mangini, supra,* at p. 1068, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

Mangini found the *Cipollone* plurality's predicate duty analysis regarding fraudulent misrepresentation claims dispositive. (*Mangini, supra,* 7 Cal.4th at p. 1068, 31 Cal.Rptr.2d 358, 875 P.2d 73.) *Mangini* reasoned: "[I]t is unlawful in California to sell cigarettes to minors or for minors to buy them. Advertising aimed at such unlawful conduct would assist vendors in violating the law. The predicate duty is to not engage in unfair

competition by advertising illegal conduct or encouraging others to violate the law. In *Cipollone,* the predicate duty-not to deceive-was not 'based on smoking and health'; this one is similarly not. 'Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to' unfairly assist or advertise illegal conduct. [Citation.]" (*Mangini, supra,* at p. 1069, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

Regarding Congress's policy of avoiding "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health," (15 U.S.C. § 1331), *Mangini* reasoned that "[s]tate law prohibitions against advertisements targeting minors do not require [tobacco companies] to adopt any particular label or advertisement 'with respect to any relationship between smoking and health'; rather, they forbid *any* advertisements soliciting unlawful purchases by minors. The prohibitions do not create ' "diverse, nonuniform, and confusing" standards. Unlike state law obligations concerning the warning necessary to render a product "reasonably safe," state law proscriptions' against advertisements targeting minors 'rely only on a single, uniform standard': do not target minors. [Citation.]" (*Mangini, supra,* 7 Cal.4th at p. 1069, 31 Cal.Rptr.2d 358, 875 P.2d 73.) Accordingly, *Mangini* concluded the UCL claim seeking to prohibit cigarette advertising aimed at minors was not preempted by section 1334(b). (*Mangini,* at p. 1069, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

Reilly

In *Reilly, supra,* 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532, the United States Supreme Court considered whether the FCLAA preempted regulations promulgated by the Attorney General of Massachusetts that prohibited, as unfair or deceptive acts or practices, outdoor and point-of-sale advertising of cigarettes and smokeless tobacco products. (*Id.* at pp. 534-535., 121 S.Ct. 2404) The stated purpose of the regulations was " 'to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age ... [and] in order to prevent access to such products by underage consumers.' [Citation.]" (*Id.* at p. ***704** 533, 121 S.Ct. 2404.) [9]

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[9] The Massachusetts regulations provided: " '[I]t shall be a unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.' [Citation.]" (*Reilly, supra,* 533 U.S. at pp. 534-535, 121 S.Ct. 2404.)

The Massachusetts Attorney General argued that the cigarette advertising regulations were not "based on smoking and health" within the meaning of section 1334(b) because they did not address health-related content in cigarette advertising but instead targeted youth exposure to the advertising. (*Reilly, supra,* 533 U.S. at p. 547, 121 S.Ct. 2404.) The *Reilly* majority disagreed with the Attorney General's "narrow construction" of the phrase "based on smoking and health." (*Ibid.*) *Reilly* noted that Congress, in enacting the current FCLAA preemption statute, "did not concern itself solely with health warnings for cigarettes. In the 1969 amendments [to the FCLAA], Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC."(*Id.* at pp. 547-548, 121 S.Ct. 2404.)

Reilly concluded: "The context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health. Massachusetts has attempted to address the incidence of underage cigarette smoking by regulating advertising, [citation], much like Congress' ban on cigarette advertising in electronic media. *At bottom, the concern about youth exposure to*

cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected." (*Reilly, supra,* 533 U.S. at p. 548, 121 S.Ct. 2404, italics added.) *Reilly* further stated: "In sum, we fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns." (*Id.* at pp. 550-551., 121 S.Ct. 2404) Accordingly, *Reilly* held that the outdoor and point-of-sale advertising regulations targeting cigarettes were preempted by the FCLAA. (*Id.* at p. 551, 121 S.Ct. 2404.)

Reilly concluded: "From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States. [¶] In these cases, Congress enacted a comprehensive scheme to address cigarette*705 smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, *even with respect to youth.*" (*Reilly, supra,* 533 U.S. at pp. 570-571, 121 S.Ct. 2404, italics added.)

Application of Cipollone, Mangini and Reilly to the Instant Case

Although plaintiffs contend this case involves UCL claims not based on defendants' advertising and promotion of cigarettes, the gravamen of the complaint is that defendants violated the UCL by targeting minors with cigarette advertising and promotion. Under *Mangini's* reasoning, this claim is not preempted by the FCLAA because its predicate legal duty (the duty to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law) is not based on smoking and health. Although *Reilly* did not expressly address *Mangini, Mangini's* reasoning cannot be reconciled with *Reilly's* conclusion that FCLAA preemption does not "permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns." (*Reilly, supra,* 533 U.S. at pp. 550-551, 121 S.Ct. 2404.)

Reilly recognized that Congress's intent in enacting the FCLAA preemption statute was "to protect the public, *including youth,* from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. *And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.*" (*Reilly, supra,* 533 U.S. at pp. 547-548, 121 S.Ct. 2404, italics added.) As the trial court in this

case correctly stated in its summary judgment ruling: "States cannot seek to impose regulations on tobacco 'advertising and promotion' in an effort to protect youth from exposure to such advertising, as Congress as already done so in banning all electronic advertising and in vesting the FTC with the authority to impose additional regulations."

Although the duty noted by *Mangini* "to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law"(*Mangini, supra,* 7 Cal.4th at p. 1069, 31 Cal.Rptr.2d 358, 875 P.2d 73) may underlie a state-law claim that seeks to prohibit cigarette advertising aimed at youth, *Reilly* clarifies that, for purposes of FCLAA preemption, the predicate legal duty underlying such a claim is fundamentally based on the more general concern about smoking and health.[10]

The United States Supreme Court's determination of a federal question, including the interpretation of a federal statute, "is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding." (*Chesapeake & O. Ry. Co. v. Martin* (1931) 283 U.S. 209, 51 S.Ct. 453, 75

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[10] The conclusion that the UCL claims here are based on "smoking and health" concerns is underscored by the fact that more than 20 paragraphs of plaintiffs' complaint address the health hazards associated with cigarette smoking, including increased risk of lung cancer and other lung diseases, pregnancy complications and birth defects, heart disease, vascular disease, stroke, peptic ulcer disease, fertility problems, and premature infant death.

L.Ed. 983; *General Motors Corp. v. City of Los Angeles* (1995) 35 Cal.App.4th 1736, 42 Cal.Rptr.2d 430; *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, ***706** 204 Cal.Rptr. 913.) Because *Mangini's* FCLAA preemption analysis concerning state-law regulation of youth-directed cigarette advertising is contrary to *Reilly's* analysis, we must follow *Reilly* and reject *Mangini's* reasoning on the issue. Under *Reilly,* plaintiffs' essential claim that defendants violated the UCL by targeting children and teenagers with unfair and deceptive marketing programs and advertising is preempted by the FCLAA because it seeks to impose requirements or prohibitions based on smoking and health with respect to the advertising and promotion of cigarettes.[11]

Reilly's Inchoate Offense Exception

Reilly observed that the FCLAA "does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA's pre-emption provision explicitly governs state regulations of

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[11] In their opening brief, plaintiffs also claim their UCL claims "are based on prohibiting California businesses from cheating the competition [and] gaining unfair competitive advantage...." To the extent plaintiffs are claiming defendants' acts of unfair competition harmed their tobacco company competitors, in contrast to the general public, plaintiffs do not have standing to assert the claim. (See *Rosenbluth Internat., Inc. v. Superior Court* (2002) 101 Cal.App.4th 1073, 124 Cal.Rptr.2d 844 [UCL action is not appropriate when the public in general is not harmed by the defendant's alleged unlawful practices].)

'advertising or promotion.' Accordingly, the FCLAA does not pre-empt state laws prohibiting cigarette sales to minors." (*Reilly, supra,* 533 U.S. at p. 552, 121 S.Ct. 2404, fn. omitted.) Noting it was illegal in Massachusetts to sell or distribute tobacco products to persons under the age of 18, *Reilly* stated: "Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt. [Citations.]" (*Ibid.*) Plaintiffs argue that to the extent their UCL claims are based on defendants' youth-directed advertising, the claims fall within *Reilly's* inchoate-offense exception to FCLAA preemption because defendants' advertising conduct constitutes the inchoate offense of aiding and abetting illegal sales of cigarettes to minors.[12]

California law does not support the imposition of criminal liability for aiding and abetting against tobacco companies based on their youth-oriented cigarette advertising and promotional activities. Penal Code section 31 provides that "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have

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[12] Plaintiffs raise this argument mainly in connection with their contention that the court erroneously denied their motion for "relief from proceedings" under Code of Civil Procedure section 473 and refused to consider, in connection with their claim that defendants aided and abetted illegal sales of cigarettes to minors, evidence identifying specific perpetrators of illegal sales.

advised and encouraged its commission, ... are principals in any crime so committed."

To prove criminal liability as an aider and abettor, it must be shown that "the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with ***707** the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 58 Cal.Rptr.2d 827, 926 P.2d 1013.)

Criminal liability for aiding and abetting attaches only when the accomplice *directly* aids or encourages an identifiable perpetrator, of whom the accomplice is specifically aware, to commit the underlying offense. Criminal liability for aiding and abetting cannot attach to defendants here on the theory that they were generally aware their advertisements and promotional activities would encourage some minors to illegally purchase cigarettes. (See *People v. Terman* (1935) 4 Cal.App.2d 345, 40 P.2d 915 ["To authorize the conviction of one as an aider and abettor of a crime it must be shown ... that he criminally or with guilty knowledge and intent ... aided the *actual perpetrator* in the commission of the act." (Italics added.)].) It is not reasonably probable that any governmental prosecutor would charge defendants

with aiding and abetting the sale of cigarettes to minors based on conduct relating to their advertising and marketing of cigarettes.

Further, plaintiffs' aiding and abetting argument raises First Amendment concerns because defendants' alleged aiding and abetting of illegal cigarette sales to minors was accomplished through their advertising, which is commercial speech. Case law addressing the loss of First Amendment protection for commercial speech that concerns unlawful activity is instructive in determining whether defendants' commercial speech at issue here is exempt from FCLAA preemption under *Reilly*.

The United States Supreme Court developed the following framework for analyzing whether regulation of commercial speech is invalid under the First Amendment: " 'At the outset [a court] must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, [the court must] ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.' " (*Reilly, supra,* 533 U.S. at p. 554, 121 S.Ct. 2404, quoting *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(*Central Hudson*).)

A state may not suppress the dissemination of truthful information about lawful activity based on fear of the information's effect upon its recipients. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346.) *Reilly* stated: "The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that 'the governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults.' [Citations.] As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.***708** [Citation.]" (*Reilly, supra,* 533 U.S. at p. 564, 121 S.Ct. 2404.) *Reilly* concluded: "The First Amendment ... constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult consumers have an interest in receiving that information." (*Id.* at p. 552, 121 S.Ct. 2404.)

The Court of Appeals in *Dunagin v. City of Oxford, Miss.* (5th Cir.1983) 718 F.2d 738(*Dunagin*) applied

similar reasoning to the issue of whether the State of Mississippi's prohibition against alcohol advertising violated the First Amendment. Rejecting the State's argument that the advertising was not entitled to First Amendment protection under *Central Hudson* because alcohol sale and distribution was illegal in nearly half of the counties in the state, *Dunagin* stated: "The commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally." (*Dunagin,* at p. 743.) *Dunagin* also rejected the State's argument that the ban on alcohol advertising was not protected "because it is misleading: falsely identifying alcohol with 'the good life' instead of disclosing the personal and social disasters it threatens, and particularly affecting the young and unsophisticated children in the public audience." (*Ibid.*) *Dunagin* responded: "Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells." (*Ibid.*)

Dunagin set forth the following "central teaching of the commercial speech doctrine [as] summed up in *Central Hudson:* 'In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication [,] rather than to close them...." [Citation.] Even when

advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.' " (*Dunagin, supra,* 718 F.2d 738, quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, supra,* 447 U.S. at p. 562, 100 S.Ct. 2343.) In response to the argument that the alcohol advertising would reach young children, *Dunagin* noted: " '[T]he government may not "reduce the adult population ... to reading only what is fit for children." ' [Citations.]" (*Dunagin,* at p. 743.)

In *Rockwood v. City of Burlington* (D.Vt.1998) 21 F.Supp.2d 411(*Rockwood*), convenience store owners challenged a city ordinance regulating the advertising and sale of tobacco products. The court noted that commercial speech proposing a commercial transaction enjoys First Amendment protection (*Rockwood,* at p. 421), and that "[t]obacco advertising proposes that people buy a product which is lawful for adults to possess and unlawful for minors to possess." (*Ibid.*) In response to the City's argument that the tobacco companies were using advertising to pitch their products to minors, *Rockwood* noted that "tobacco companies' advertisements attempt to appeal indiscriminately to any individual who views them.... Regardless of whether tobacco advertising causes adolescents to smoke, or whether the tobacco companies have targeted the 'youth market,' advertising that does not *directly* incite***709** illicit activity is protected. [Citations.]" (*Ibid.,* italics added.) [13]

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[13] Addressing the argument that the tobacco advertising was misleading, *Rockwood* conceded "there is evidence that tobacco

For the proposition that advertising must *directly* incite illicit activity to lose First Amendment protection, *Rockwood* cited *Carey v. Population Services International* (1977) 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675(*Carey*) and noted *Carey* cited *Brandenburg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430(*Brandenburg*). In *Brandenburg,* the United States Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg, supra,* at p. 447, 89 S.Ct. 1827.) In *Carey* the Supreme Court relied on *Brandenburg* as support for its conclusion that advertisements of contraceptive products could not be banned on the ground they would legitimize illicit sexual activity among young people, because the advertisements could not "even remotely be characterized as 'directed to inciting or producing imminent lawless action and ... likely to incite or

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advertisements seek to associate use of tobacco with all sorts of desirable activities, and thereby deliberately suggest that smoking will make you healthier, wealthier, wiser, and wildly popular." (*Rockwood, supra,* 21 F.Supp.2d at p. 421.) *Rockwood* noted, however, that the tobacco advertisements in question also contained truthful, nonmisleading information about brand availability and price, and that if " 'truthful and nonmisleading expression will be snared along with ... deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test....' "(*Id.* at pp. 421-422, 100 S.Ct. 2343, quoting *Edenfield v. Fane* (1993) 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 [i.e., the first part of the test, requiring that the speech concern lawful activity and not be misleading, is satisfied].)

produce such action.' [Citation.] They merely state the availability of products and services that are not only entirely legal [citation], but constitutionally protected. [Citation.]" (*Carey, supra,* 431 U.S. at p. 701, 97 S.Ct. 2010, fn. omitted, quoting *Brandenburg,* at p. 447, 89 S.Ct. 1827.)

Reilly, Rockwood, and, by analogy, *Dunagin* and *Carey* support the proposition that however socially objectionable and subject to regulation by the FTC it may be, cigarette advertising and speech-related promotion that does not *directly* incite minors to purchase cigarettes passes the "lawful and not misleading" part of the *Central Hudson* test and thus is entitled to First Amendment protection. As in *Rockwood,* "there is no contention here that the advertisements, whatever the marketing strategy behind them, say 'Kids, get your Camels here.'" (*Rockwood, supra,* 21 F.Supp.2d at p. 421.) Because the cigarette advertising and promotion at issue in this case is not unlawful or misleading under the *Central Hudson* test, a fortiori, it cannot constitute aiding and abetting or any other inchoate criminal offense.

The trial court in this case concluded that because defendants' alleged aiding and abetting involved speech, the *Brandenburg* "inciting imminent lawless action" test would have to be satisfied to establish that defendants' conduct was sufficiently criminal to fall within *Reilly's* inchoate offense exception to FCLAA preemption. Plaintiffs contend the *Brandenburg* test does not apply to a determination of whether restrictions on commercial speech violate

the First Amendment under *Central Hudson.* Although the merit of that contention is dubious considering *Carey's* reliance on *Brandenburg,* we need not decide the point because we are not applying ***710** the *Brandenburg* test to determine whether plaintiffs' action seeks an unconstitutional restriction on commercial speech under *Central Hudson;* we are applying it to determine whether plaintiffs' claims are exempt from FCLAA preemption under *Reilly* because defendants' alleged conduct amounts to the inchoate criminal offense of aiding and abetting violations of Penal Code section 308.

McCollum v. CBS, Inc. (1988) 202 Cal.App.3d 989, 249 Cal.Rptr. 187(*McCollum*) supports the proposition that the *Brandenburg* test applies to any determination of whether speech can constitutionally be restricted on the ground it involves criminal conduct. *McCollum* noted that under *Brandenburg,*"to justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct *and* (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test." (*McCollum,* at p. 1000, 249 Cal.Rptr. 187, citing *Hess v. Indiana* (1973) 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303; see also *People v. Rubin* (1979) 96 Cal.App.3d 968, 158 Cal.Rptr. 488 [applying *Brandenburg* test to determine whether defendant's public statements that could be interpreted as solicitation of murder were protected by First

Amendment so as to immunize defendant from prosecution].)

Defendants' cigarette advertising and promotion allegedly aimed at youth, like advertising generally, was inherently directed to action (the purchase of cigarettes by recipients of the advertisement) at some indefinite time in the future. Consequently, it cannot be restrained on the ground it incites lawless action and cannot properly be deemed aiding and abetting illegal purchases of cigarettes by minors. Commercial speech entitled to First Amendment protection because it does not directly or expressly encourage illegal action cannot qualify as the type of encouragement to commit a crime required to impose criminal liability for aiding and abetting.[14]

To the extent plaintiffs' UCL claims are based on defendants' cigarette advertising and promotional activities, they are preempted by the FCLAA.

IV

Plaintiffs' Purported Nonadvertising or Promotion Claims

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[14] Considering our conclusion that, based on the allegations in the complaint, defendants cannot be held criminally liable for aiding and abetting illegal sales of cigarettes to minors, we need not address plaintiffs' contention that the court erred by denying their motion for "relief from proceedings" under Code of Civil Procedure section 473 and refusing to consider, in connection with their aiding and abetting claim, evidence identifying specific perpetrators of illegal sales of cigarettes to minors.

Plaintiffs contend the court should not have granted summary judgment on the ground of FCLAA preemption because they advanced four nonadvertising or promotion theories of recovery under the UCL. Plaintiffs' opening brief states that their "non-advertising ... theories of recovery are premised on each of the [defendant's] specific unfair deceptive, and unlawful conduct of (i) researching, surveying and test marketing minors in order to craft strategies to encourage them to smoke, (ii) adulterating cigarettes to appeal to children and make them more rapidly addictive, (iii) using slotting agreements to create self-serve displays at retail locations where minors shop to make the Youth Brands more accessible to minors[,] ***711** and (iv) lying to the public and their competitors about their research, business strategies and the addictive properties of their cigarettes." We address these claims separately.

Researching, Surveying and Test Marketing Minors

In the general allegations section of the complaint, plaintiffs allege "each of the [defendants] studies how to attract minors and engages in conduct to accomplish that goal." After citing examples of internal memoranda by defendants R.J. Reynolds and Philip Morris concerning increased smoking by minors, plaintiffs allege "[d]efendants have engaged in a course of conduct designed to promote cigarette smoking among young people," including advertising campaigns intended to appeal to minors, placing tobacco advertisements near schools and

playgrounds, and engaging in various promotional activities designed to appeal to young people.[15]

The *Cipollone* plurality stated the FCLAA "does not ... pre-empt ... claims that rely solely on [tobacco companies'] testing or research practices or other actions *unrelated to advertising or promotion.*" (*Cipollone, supra,* 505 U.S. at p. 524-525, 112 S.Ct. 2608, italics added.) The corollary of that statement is that the FCLAA *does* preempt claims based on testing or research practices that *are* related to advertising or promotion. Plaintiffs' claim that defendants violated the UCL by researching, surveying and test marketing minors "*in order to craft strategies to encourage them to smoke* " (i.e., target them with cigarette advertising and promotion) is related to defendants' advertising and promotion of cigarettes, and is therefore preempted by the FCLAA.

Adulterated Cigarettes

Plaintiffs claim defendants violated the UCL by adding flavorings, including licorice and chocolate, to cigarettes to make them more palatable to children, and by adding ammonia and other chemicals to suppress the gag reflex of children experimenting with cigarettes and to make the cigarettes more

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[15] These allegations involving youth-smoking studies by defendants and tobacco company internal memoranda about increased smoking among minors (contained in paragraphs 47 through 51 of the complaint) are the only allegations in the complaint suggesting defendants have engaged in "researching, surveying and test marketing minors in order to craft strategies to encourage them to smoke."

rapidly addictive. Plaintiffs essentially are making this claim for the first time on appeal. The complaint contains no cigarette-adulteration allegations and plaintiffs did not address cigarette adulteration as an independent theory of UCL liability in any of their points and authorities in opposition to summary judgment.[16] Rather, plaintiffs stated in their memorandum of points and authorities in opposition to defendants' motion for summary judgment based on FCLAA preemption: "This case presents three basic claims: *first,* the specific ad campaigns used by the Defendants for four of their ***712** cigarette brands ... during the Class Period ... were created and used to intentionally target teenagers and children, as did the ad placement, promotions and other marketing techniques used in those campaigns; *second,* to try to neutralize information reaching children from teachers, parents and public health officials concerning the health risks of smoking, the Defendants lied under oath to Congress during the Class Period, and made false statements in newspapers, denying that smoking was dangerous or

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[16] Plaintiffs' only mention of cigarette adulteration in their briefing to the trial court is the following passing reference in the statement of facts section of their memorandum of points and authorities in opposition to defendants' joint motion for summary judgment on First Amendment grounds: "Camel's [post-1997] campaigns-What You're Looking For, Pleasure to Burn and Mighty Tasty-used almost explicit sex and mockeries of the FDA's warning labels to attract teenagers, along with flavorings such as vanilla, mint, chocolate and orange." Defendants' alleged addition of ammonia and other chemicals to cigarettes is not mentioned in any of plaintiffs' opposition points and authorities or separate statements of undisputed facts in opposition to defendants' summary judgment motions.

addictive; *and third,* to make the public in general, and teenagers specifically, believe that the dangers of smoking could be reduced or avoided, Defendants marketed 'Light' cigarettes, with knowledge these descriptors were false because smokers ingest as much or more tar and nicotine smoking these cigarettes with no reduction in health risk."[17]

A summary judgment motion must be directed to the issues raised by the pleadings, and the papers filed in opposition to the motion may not create issues outside the pleadings or operate as a substitute for an amendment to the pleadings. (*Nash v. Fifth Amendment, supra,* 228 Cal.App.3d at p. 1116, 279 Cal.Rptr. 465.) A defendant moving for summary judgment is not required to refute liability on some theory not included in the pleadings. (*Ibid.*) Further, points neither asserted below nor considered and ruled on by the trial court are generally deemed waived and will not be considered for the first time on appeal. (*Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 100 Cal.Rptr.2d 403.) Accordingly, plaintiffs' cigarette-adulteration claim provides no basis to reverse the court's grant of summary judgment on the ground of FCLAA preemption.

Slotting Agreements

Plaintiffs asserted in their opposition to summary judgment that defendants, throughout the class period, "paid convenience store owners a premium to

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[17] As noted, plaintiffs waived or abandoned their "Light" cigarette claim on appeal. (*Ante,* fn. 5.)

place self-service cigarette displays on the counters of their stores that are readily accessible to children so as to encourage children to take cigarettes without age verification." However, because plaintiffs' complaint makes no reference to these "slotting agreements," they were not a proper ground for opposing defendants' summary judgment motion based on FCLAA preemption.

In any event, we conclude the trial court correctly ruled that plaintiffs' slotting-agreement claim was preempted by the FCLAA based on language in *Jones v. Vilsack* (8th Cir.2001) 272 F.3d 1030(*Jones*). To ascertain the plain meaning of the word "promotion" as used in section 1334(b), *Jones* looked to an FTC report and the Surgeon General's 1994 report entitled *Preventing Tobacco Use Amongst Young People,* which lists various promotions conducted by tobacco companies. The following passage from the Surgeon General's report, quoted by *Jones,* describes the type of promotion plaintiffs refer to as a "slotting agreement": " 'Promotional activities can take many forms. Promotional expenditures can stimulate retailers to place and display products in ways that will maximize the opportunity for purchase (e.g., supplying retailers with point-of-purchase displays to locate products at checkout stands).' " (*Jones,* at p. 1035.)

***713** Although *Jones* acknowledged the FTC Report and Surgeon General's Report did not "announce formal agency definitions of 'promotion' "(*Jones, supra,* 272 F.3d at p. 1035),*Jones* found use of the word "promotion" in the reports to be "probative of

the term's plain and ordinary meaning in the context of cigarette marketing." (*Ibid.*) *Jones* stated: "To be sure, the FTC and the Surgeon General are experts on the topic. The FCLAA charges the FTC with a duty to report to Congress on the 'current practices and methods of cigarette advertising and promotion,' [citation], and the Surgeon General's Reports historically have provided the political and scientific impetus to enact and amend the FCLAA. Thus we consider the Reports' use of the term 'promotion' indicative of the term's plain and ordinary meaning." (*Id.* at pp. 1035-1036.)

Plaintiffs' unpleaded slotting agreement claim is preempted by the FCLAA because it seeks to impose a prohibition under state law with respect to the promotion of cigarettes.[18]

Misrepresentations to the Public and Competitors

Plaintiffs claim defendants deceived the public and their competitors by publicly denying they were targeting minors with their cigarette marketing strategies and denying cigarette smoking is addictive.[19] The only allegation in the complaint that

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[18] Plaintiffs erroneously assert at two places in their opening brief that *Reilly* held state prohibition of point-of-sale placement of cigarettes is not preempted by FCLAA. *Reilly* held only that such prohibitions are not barred by the First Amendment (*Reilly, supra,* 533 U.S. at pp. 569-570, 121 S.Ct. 2404); it did not address whether they were preempted by the FCLAA.

[19] Plaintiffs do not have standing to challenge defendants' alleged misrepresentations to their competitors because those misrepresentations would not have harmed the general public. (Fn.11, *ante.*)

defendants lied about marketing cigarettes to minors is that on or about April 1, 1994 (one day before the first day of the class period) the vice president of the Tobacco Institute, which is not a party to this appeal, stated on the MacNeil/Lehrer News Hour television program that tobacco manufacturers are not targeting and marketing the sale of cigarettes to minors.

Plaintiffs' separate statements of undisputed facts filed in opposition to defendants' summary judgment motions contain only two assertions involving misrepresentations about marketing cigarettes to minors.[20] The first is that in 1985, R.J. Reynolds's law department issued a "Marketing Assistant Training Manual" that stated the company did not research or market its products to persons under 18 years of age. This statement is not actionable because it predates the class period and, in any event, was not allegedly disseminated to the plaintiff class or other members of the general public.

Plaintiffs' other assertion involving a representation about marketing cigarettes to minors is that in February 2001, the president of defendant Lorillard Tobacco Company stated in a letter to the Attorney General of Washington State that the company did not feel any of its current advertisements targeted young people. This statement is not actionable because it postdates the class period and was not allegedly disseminated to the plaintiff class or other members of the general public.

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[20] Plaintiffs filed an original and a "first amended" separate statement.

Even if plaintiffs' complaint sufficiently pleaded the theory that defendants denied targeting minors with their cigarette marketing strategies, their separate statements*714 in opposition to summary judgment did not place that theory in issue. "A party waives a new theory on appeal when he fails to include the underlying facts in his separate statement of facts in opposing summary judgment. [Citation.] A new theory on appeal is also waived when the new theory involves a controverted factual situation not put in issue below. [Citation.]" (*City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 55 Cal.Rptr.2d 422.) Plaintiffs' theory that defendants denied targeting minors with cigarette advertising and promotion is waived.[21]

Plaintiffs asserted in their points and authorities in opposition to summary judgment on preemption grounds that "to try to neutralize information reaching children from teachers, parents and public health officials concerning the health risks of smoking, the Defendants lied under oath to Congress

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[21] In any event, there is no merit to the claim that class members were deceived or misled by misrepresentations that the defendant tobacco companies were not targeting minors with cigarette advertising and promotions. Class members were either influenced to smoke by defendants' youth-directed advertising and promotions or they were not. In the highly unlikely event any of them were even aware of defendants' alleged misrepresentations about not engaging in youth marketing strategies, it is implausible that those misrepresentations factored into their decision to smoke.

during the Class Period, and made false statements in newspapers, denying that smoking was dangerous or addictive." Plaintiffs presented two evidentiary items to support this claim: the videotaped testimony of executives of defendants before Congress, and an April 13, 1994 advertisement by Philip Morris in the New York Times that contains the statement, "Philip Morris does not believe cigarette smoking is addictive." The trial court sustained defendants' objection to admission into evidence of that videotaped testimony before Congress based on Civil Code section 47, subdivision (b)(1), which immunizes statements made in legislative proceedings from liability. The court properly applied that statute and did not abuse its discretion by excluding defendants' Congressional testimony.[22]

The court also sustained defendants' objection to both items of evidence based on former Civil Code section 1714.45 (or the Immunity Statute) as interpreted by *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 123 Cal.Rptr.2d 61, 50 P.3d 769(*Naegele*). The Immunity Statute "granted tobacco companies complete immunity in certain product liability lawsuits as of January 1, 1988. (Added by Stats.1987, ch. 1498, § 3, p. 5778.) The second version [of the statute] rescinded that immunity 10 years later on January 1, 1998. (Stats.1997, ch. 570, § 1.)"(*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 123 Cal.Rptr.2d 40, 50 P.3d 751, fn. omitted.) [23]

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[22] Plaintiffs do not address this evidentiary ruling on appeal.

[23] Former Civil Code section 1714.45 provided: "(a) In a product liability action, a manufacturer or seller shall not be liable if: [¶] (1) The product is inherently unsafe and the product is known to

In *Naegele* the California Supreme Court decided the Immunity Statute ***715** barred the plaintiff's claim that the defendant tobacco companies " 'lied about the addictive nature of smoking' in 'a campaign designed to deceive the public, plaintiff, the government, and others as to the health hazards of smoking.' " (*Naegele v. R.J. Reynolds Tobacco Co., supra,* 28 Cal.4th at p. 866, 123 Cal.Rptr.2d 61, 50 P.3d 769.) *Naegele* stated that "under the Immunity Statute's broad definition of product liability lawsuits, it makes no difference whether a claim seeking damages for 'personal injury or death' caused by a tobacco product is labeled as one for negligence, manufacture of an inherently unsafe product or fraud." (*Id.* at p. 863.) *Naegele* concluded: "Regarding defendants' conduct during the statutory immunity period, we conclude that the Immunity Statute bars plaintiff's claims, *however labeled,* where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products

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be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and [¶] (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco,* and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts. [¶] (b) For purposes of this section, the term 'product liability action' means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty. [¶] (c) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.,* (1972) 8 Cal.3d 121 [104 Cal.Rptr. 433, 501 P.2d 1153], and shall apply to all product liability actions pending on, or commenced after, January 1, 1988." (Italics added.)

such as cigarettes." (*Id.* at p. 867, 123 Cal.Rptr.2d 61, 50 P.3d 769, italics added.) [24]

The trial court in this case decided *Naegele's* construction of the term "products liability action[s]" as used in the Immunity Statute was "obviously meant to include all tort actions and non-tort actions (such as the instant UCL case) based on tort theories like fraud and misrepresentation...." The court agreed with defendants that "any other interpretation would turn the law on its head, as it would mean that plaintiffs who have suffered actual physical injury or death due to tobacco company fraud during the [i]mmunity period could not recover, while a member of the instant class who is alleging no injury, other than being induced to smoke, could recover through the remedy of restitution the cost of the cigarettes purchased during the class period simply because he is a member of a UCL class action."

Plaintiffs contend the court erroneously sustained defendants' objection to Philip Morris's New York Times advertisement, arguing *Naegele's* holding does not apply to their UCL action because they are not seeking tort damages but rather restitution for each class member's "separate and distinct injuries." However, the determination of whether a case is

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[24] *Naegele* held that "the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself...."(*Naegele v. R.J. Reynolds Tobacco Co., supra,* 28 Cal.4th at p. 865, 123 Cal.Rptr.2d 61, 50 P.3d 769.) Accordingly, *Naegele* held the immunity statute did not bar the "plaintiff's claims that the defendants adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking." (*Id.* at p. 867, 123 Cal.Rptr.2d 61, 50 P.3d 769.)

barred by the Immunity Statute does not turn on the type of relief plaintiffs seek; it turns on whether the action is an "action for injury ... caused by a product" within the broad meaning of former Civil Code section 1714.45. The fact that plaintiffs seek restitution instead of tort damages does not make the Immunity Statute inapplicable.

The Immunity Statute does not differentiate between physical and economic injury in its definition of the term "products liability action"; it simply defines that term as "*any* action for injury or death caused by a product...." (Italics added.) Black's Law Dictionary defines "injury" as "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice." (Black's Law Dict. (8th ed.2004) p. 801, col. 1.) The same dictionary defines "personal injury" as "[a]ny invasion of a personal right, including mental suffering and false imprisonment." (*Id.* at p. 802, col. 1.)

***716** The complaint alleges plaintiffs have been deceived by defendants' advertising campaigns and failure to disclose the addictive nature of cigarettes and the costs associated with maintaining the addiction. As a result, plaintiffs allege they "have developed an addiction to cigarette smoking which effects [*sic*] each and every one of them every day. The representative Plaintiffs inexplicably desire to smoke and feel a need to do so at certain times every day. This need drives them to continue to purchase and consume cigarettes even though the adverse health effects are becoming increasingly well-known." The complaint also alleges that "[e]ach of the named

class representatives and members of the class were exposed to Defendants' systematic deceptive advertising campaigns and inadequate cigarette packaging labels in the State of California; *each of the Plaintiffs and members of the class have been damaged by Defendants' deceptive business practices as alleged herein.*" (Italics added.) The complaint's prayer for relief requests "an order requiring defendants to make restitution to the members of the class of all monies wrongfully acquired by defendants by means of their violations of [the UCL]."

The allegations that plaintiffs were deceived by defendants' advertising and nondisclosures *and suffered cigarette addiction* as a result, along with the general allegation that plaintiffs were damaged by defendants' alleged deceptive business practices and the prayer for monetary restitution, establish that plaintiffs are suing for physical, psychological and economic "injuries"-i.e., wrongs inflicted by defendants in violation of plaintiffs' legal right not to be subjected to them-and that the alleged injuries were, at bottom, caused by cigarettes manufactured and sold by defendants. Thus, the allegations bring the instant action within the Immunity Statute's "broad definition of product liability lawsuits"(*Naegele v. R.J. Reynolds Tobacco Co., supra,* 28 Cal.4th at p. 863, 123 Cal.Rptr.2d 61, 50 P.3d 769), as they establish an "action for injury ... caused by a product" within the meaning of the statute. Because plaintiffs' claim that defendants lied about the addictive nature of cigarettes is a "products liability" claim within the meaning of the Immunity

Statute, defendants are immune from liability for that claim.[25]

We conclude the trial court properly applied the Immunity Statute and *Naegele* to the instant action. Accordingly, we conclude the court did not abuse its discretion by sustaining defendants' evidentiary objections to Philip Morris's April 1994 New York Times advertisement and defendants' Congressional testimony. Plaintiffs presented insufficient evidence to raise a triable issue of fact as to whether defendants made actionable misrepresentations about the addictive properties of their cigarettes to members of the plaintiff class.

V

Plaintiffs' Request for Leave to Amend the Complaint

Plaintiffs contend that defendants' summary judgment motions were effectively motions for judgment on the pleadings and, therefore, we should order the trial court to allow them to amend their complaint if the alleged facts show they have a good cause of action imperfectly pleaded. We reject this contention because plaintiffs did not seek leave to amend below.

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[25] Although the class period extends a year beyond the expiration of the Immunity Statute, defendants' Congressional testimony and Philip Morris's New York Times advertisement occurred in 1994, when former Civil Code section 1714.45 was still in effect.

If the facts presented on a summary judgment motion would support causes of action not asserted in the complaint,*717 "it is incumbent on the pleader to make some request to amend so that the pleading *is* adequate. In the absence of such a request, the court is under no duty to inquire whether there are causes of action or defenses inherent in the facts but not articulated by the pleading. [Citations.]" (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 32 Cal.Rptr.2d 388.) A plaintiff may not seek leave to amend his or her pleading for the first time on appeal when the record does not show the plaintiff sought leave to amend before the hearing on a summary judgment motion. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 102 Cal.Rptr.2d 813.)

CONCLUSION

Restriction of cigarette advertising and promotion directed to minors reflects a governmental policy. However, we simply conclude that under the FCLAA, Congress has given the FTC the exclusive authority to address society's concern about smoking and health by regulation of cigarette advertising and promotion, and has preempted "state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth." (*Reilly, supra,* 533 U.S. at pp. 570-571, 121 S.Ct. 2404.)[26]

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[26] Because we conclude plaintiffs' claims are preempted by the FCLAA, we do not address the parties' First Amendment arguments apart from our discussion on the issue of whether defendants' youth-directed advertising and promotion of

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

WE CONCUR: McCONNELL, P.J., and NARES, J.

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cigarettes is within *Reilly's* inchoate offense exception to FCLAA preemption.

Not Reported in Cal.Rptr.2d,
2002 WL 31628641 (Cal.Superior)

Superior Court, San Diego County, California.
JCCP 4042 In re TOBACCO CASES II
No. SDSC 719446.
Nov. 22, 2002.

FINAL RULING ON MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR RESOLUTION OF LEGAL ISSUES UNDER CRC 1541, BASED ON FEDERAL PREEMPTION UNDER 15 U.S.C. SECTION 1334(b)

The Court rules on defendants Philip Morris Incorporated's, R.J. Reynolds Tobacco Company's, Brown & Williamson Tobacco Corporation's and Lorillard Tobacco Company's (collectively, "Defendants") Motion for Summary Judgment, or, in the Alternative, Motion for Resolution of Legal Issues under CRC 1541, Based on Federal Preemption under 15 U.S.C. § 1334(b) against plaintiffs Devin Daniels, et al.'s (collectively, "Plaintiffs") Second Amended Complaint (the "Complaint") as follows:

The Court grants the Motion, as Plaintiffs' class action is barred by the express preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA" or the "Act"). 15 U.S.C. § 1334(b) (2002).

As noted in the Court's ruling on Defendants' motion for summary judgment based on the First

Amendment to the U.S. Constitution and Article I, Section 2 of the California Constitution ("Ruling on the 1 Amendment MSJ"), which is herein incorporated by reference as though set forth in full, Plaintiffs consist of "all Californians that, in the last four years, from the date of filing the complaint, have smoked at a time when they were under 18 years of age." Complaint, ¶ 127. Thus, the class period runs from April 2, 1994 through December 31, 1999.

The central issue in this Motion is the scope of the express preemption provision set forth in the FCLAA at 15 U.S.C. section 1334(b), and whether it preempts the instant action, which was filed pursuant to California Business and Professions Code sections 17200, et seq. and 17500 et seq. (the "Unfair Competition Law," or "UCL"). Defendants and Plaintiffs are essentially at odds over whether the latest case decided by the U.S. Supreme Court, namely *Lorilland Tobacco Co. v. Reilly,* 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (hereinafter "Reilly"), which addresses the scope of FCLAA's preemption provision, controls here. (The preemption provision, 15 U .S.C. 1334(b), provides that: "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.").

Defendants argue that *Reilly* does control and that it dictates the dismissal of this action because it falls within the preemption provision, as construed by *Reilly.* Plaintiffs argue that *Reilly* is inapposite with

regard to Plaintiffs' state-law claims under the UCL (as to the "unfair" and "misleading" prongs) and that it supports Plaintiffs' UCL claim (as to the unlawful prong). This notwithstanding, Plaintiffs urge this Court to instead follow *Mangini v. R.J. Reynolds Tobacco Co.,* 7 Cal.4 1057 (2001), and find that the instant action is not preempted.

II. ANALYSIS

A. Mangini's *holding was based on* Cipollone, *which supports Defendants' rather than Plaintiffs' position, and mandates the dismissal of the instant action as preempted under 15 U.S.C. 1334(b).*

*2 *Mangini* is a California Supreme Court decision handed down years before *Reilly.* According to Plaintiffs, *Mangini* supports the position that the instant action is not preempted because the regulations or injunctions it proposes are not based on concerns about smoking and health. (See Ruling on 1 Amendment MSJ regarding why the Court must analyze the issues presented in Defendants' various motion as though Plaintiffs have not abandoned their request for broad injunctive relief.) Plaintiffs argue that in *Mangini,* the Court concluded that plaintiffs there could bring a valid UCL action despite 15 U.S.C. 1334(b) because Congress did not preempt state enforcement of laws prohibiting youth smoking (specifically Penal Code § 308) or state laws prohibiting false and misleading affirmative misrepresentations of fact in advertising. Plaintiffs

assert that the instant action, which also seeks enforcement of Penal Code section 308 and prohibitions on false and misleading advertisement, is valid for the same reasons.

The *Mangini* Court's holding that state courts can enforce Penal Code section 308 (through the UCL) was based on the reasoning of a prior U.S. Supreme Court decision, namely *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). To determine whether an action is barred as violative of the FCLAA's preemption provision, *Cipollone* requires an analysis of the purpose or motivation behind the law sought to be imposed, or in the words of *Mangini,* an analysis of "the legal duty that is the predicate of the common-law damages action." *Mangini,* 7 Cal.4 at 1067 (quoting *Cipollone,* 505 U.S. at 523-24). The analysis allows a court to determine whether the common-law damages action "constitutes a 'requirement or a prohibition based on smoking and health ... imposed under state law with respect to ... advertising and promotion,' given that clause a fair but narrow reading." *Id.*

It should be emphasized that in *Cipollone,* the Court's decision focused on claims of *damages* brought under state common law, as opposed to statutory claims for equitable relief, such as injunctions and disgorgement. Indeed, the Court made very clear that each common law claim needed to be analyzed to determine whether the cause of action required the imposition of "affirmative *requirements,*" or "negative *prohibitions,*" under state law, as such mandates or

prohibitions were preempted by 15 U.S.C. 1334(b). *Cipollone,* 505 at 522 (emphasis in original).

Cipollone stresses time and again that "[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a *requirement or prohibition* based on smoking and health with respect to advertising or promotion." *Id.* at 525, 523-24. This holding makes eminent sense in light of Congress' purpose to protect the national economy from interference due to "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health," as the imposition of such positive enactments (requirements or prohibitions) would frustrate that purpose. *Id.* at 519; *see also Reilly,* 525 U.S. at 542-43. Consistent with this analytic approach, the plurality decision in *Cipollone* carefully pointed out that the claim for breach of warranty that was at issue there was not preempted precisely because "the 'requirements' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed by the *warrantor." Id.* at 525 (emphasis in original).

*3 The *Cipollone* Court also distinguished the two theories of misrepresentation alleged by petitioner in that action, noting that the first theory alleged that the respondent tobacco companies had "neutralized the effect of federally mandated warning labels." This theory of misrepresentation was preempted, the Court stated, because "[s]uch a claim is predicated on a state-law *prohibition* against statements in

advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527 (emphasis added). With regard to the second theory of misrepresentation, the Court noted that it alleged intentional fraud both " 'by false representation of a material fact [and by] concealment of a material fact." ' *Id.* at 527-28. *Cipollone* then held that the intentional fraud claim was not preempted since "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards" because they "rely only on a single, uniform standard: falsity." *Id.* at 529.

It therefore appears that while the *Mangini* Court made the pertinent inquiry of determining the predicate legal duty on which the state-law damages claim was based (there, as here, a UCL "unlawful" claim based on alleged violations of Penal Code section 308), the Court did not fully consider whether the requested injunctive relief would conflict with Congress' stated purpose of obviating, through its preemption provision, the imposition of "diverse, nonuniform, and confusing standards." In fact, *Mangini* is somewhat ambiguous in this regard.

The *Mangini* concluded that " 'the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to' unfairly assist or advertise illegal conduct," and that "[u]nlike state obligations concerning the warning necessary to render a product 'reasonably safe,' state law proscriptions against advertisements targeting minors 'rely on a single uniform standard': do not

target minors." *Id.* at 1069 (quoting *Cipollone,* 505 U.S. at 529)). However, *Mangini* then proceeded to recognize that its holding addressed "the sole issue ... of whether the *basis* for the injunctive relief sought is preempted," not whether "any particular form of injunctive relief would be proper, as [a]ny challenge to a particular remedy, should plaintiff prevail on the merits ... [was] premature." *Mangini,* 7 Cal.4 at 1073 (emphasis added).

Further, while it relied on *Cipollone's* pronouncement that there was " 'no distinction between positive enactments and common law" ' to support its position that actions for equitable relief were not preempted by 15 U.S.C. 1334(b), it is clear that *Mangini* did not consider the effect which the imposition of injunctions on tobacco advertising and promotions would have on the preempted field. Rather, *Mangini* left unanswered the critical question of whether the type of relief sought by way of a UCL action could, *in the final analysis,* invalidate the action in light of the scope of Congress' preemption provision and its stated purpose of avoiding the imposition of "diverse, nonuniform, and confusing [state-mandated] standards" on tobacco advertising and promotion. The *Mangini* Court's decision not to consider whether the injunctive relief sought would, if granted, contravene the purpose of the FCLAA is understandable given that *Mangini* was in a very early stage and the primary issue before the Court was not whether the claim could withstand summary judgment (as is the issue here), but whether the plaintiff should be allowed to amend the complaint in the first instance

to state a cause of action under the UCL's "unlawful" prong.

*4 [1] For purposes of this case, which seeks broad injunctive relief akin to negative prohibitions on tobacco advertisement, and this Motion for summary judgment, *Mangini* and *Cipollone* do make one thing clear: that Plaintiffs' section 17200 claim under the deceptive and misleading prongs and Plaintiffs' section 17500 claim are preempted insofar as they are based on the same or a similar fraud theory examined in *Cipollone* (namely that of negating or rendering ineffective the federally mandated warnings on cigarette packages or, as stated in this case, that of "try[ing] to neutralize information reaching children from teachers, parents and public health officials concerning the health risks of smoking" (see Plaintiffs' Opposition Memorandum at 1:27-1:2), as the Courts in *Cipollone* and *Mangini* found these claims to be preempted. *Mangini,* 7 Cal.4 at 1067 (discussing *Cipollone*). Moreover, the reasoning behind the Court's decision in *Cipollone* is very applicable here, as any contrary ruling in this action would lead to the imposition of an impermissible prohibition that would constitute "the converse of a state-law *requirement* that warnings be included in advertising and promotions materials." *Cipollone,* 505 U.S. at 527 (emphasis in original); *see also, infra,* regarding this Court's ruling on the admissibility of Plaintiffs' evidence on Defendants' alleged false representations about the addictive nature of smoking.

It is also worth mentioning that in *Mangini,* the Court was solely addressing the issue of whether one (and only one) particular advertising practice involving a cartoon character, namely Old Joe Camel, was unlawful as it "target [ed] minors for the purpose of inducing and increasing their illegal purchase of cigarettes," whereas here, Plaintiffs are challenging the content and placement of *all* tobacco advertising of the four alleged youth brands (Marlboro, Camel, Cool and Newport) (hereinafter "Youth Brands" or "Brands") that include positive images or associate smoking with positive attributes as well the location of the advertisements. Complaint, ¶¶ 52(a)53, 54, 67, 70, and 72.

Thus, the purported uniform regulation of "do not target minors" that was upheld in *Mangini* as to one particular advertising campaign (Joe Camel) would, in effect, if applied here, require the imposition of a sweeping ban on all advertising of the Youth Brands. Further, given that virtually all product advertising associates the product with desirable, positive activities, beautiful, smart people or celebrities, one cannot but wonder what sort of imagery would be left for Defendants to use in advertising their Brands to adult smokers. *E.g., Dunagin v. The City of Oxford,* 718 F.2d 738 (5th Cir.) ("Nearly all advertising associates the promoted product with a positive and alluring lifestyle or famous or beautiful people."); *see also Reilly,* 533 U.S. at 571 ("The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating

information about its products and adult customers have an interest in receiving that information.").

*5 Just as important, and as Defendants are quick to point out, what a particular state court considers unlawful and therefore bans (through a UCL injunction/regulation) might very well differ such that allowing state court regulation of advertising that purportedly targets minors could not but create a hodgepodge of conflicting or inconsistent state injunctions/regulations, undermining Congress' purpose in enacting 15 U.S.C. 1334(b). In any event, *Mangini* decided not to consider whether actions alleging youth targeting that seek prohibitions on tobacco advertising are automatically preempted. As a result, and in light of the purpose of the FCLAA's preemption provision, this Court is required to turn to *Reilly* for an answer to that question.

B. Reilly's *holding and the second part of the applicable preemption analysis control here and also require the dismissal of this action as preempted under 15 U.S.C. 1334(b).*

In *Reilly,* the U.S. Supreme Court rejected the distinction proposed by the Attorney General of the State of Massachusetts and Plaintiffs here between regulations promulgated as a result of a state's narrower concern with combating allegedly unfair or deceptive advertising targeting minors and regulations that are issued as a result of a state's broader concern that are "based on smoking and health." The Court stated that the proffered

distinction was without merit because the former concern is "intertwined" with or motivated by the latter. *Reilly,* 533 U.S. at 548, 550-51. *Reilly* therefore stands for the proposition that a state cannot avoid preemption under 15 U.S.C. 1334(b) simply by declaring that its regulations/injunctions are geared toward enforcing its prohibitions on underage smoking and/or correcting the tobacco companies' misinformation campaign to induce violations of penal code provisions prohibiting youth smoking.

Indeed, in *Reilly,* the High Court rejected (albeit implicitly) *Mangini's* interpretation of Congressional intent regarding section 1334(b), which Plaintiffs rely upon heavily here. According to *Mangini's* interpretation, Congress could not possibly have intended to preempt state efforts to combat underage tobacco smoking in light of the many incentives or directives Congress has given the states to enforce their laws prohibiting youth smoking. See Plaintiffs' Supplemental Opposition Memorandum, at 3-4; *see also Mangini,* 7 Cal.4 at 1070, and at 1073-74 ("Congress left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law.").

The *Reilly* Court rejected this reasoning by recognizing that when Congress passed the FCLAA and certain of its amendments, it sought to protect the public, *including youth,* by banning all tobacco advertising in electronic media. *Reilly,* 523 U.S. at 542-43. *Reilly* further recognized that Congress vested the Federal Trade Commission (the "FTC") with authority to regulate unfair or deceptive

advertising or promotional activities in the tobacco industry on a uniform, national basis, including any practices directed at or *targeting youth* to purchase and smoke cigarettes. *Id.* at 548 ("In the 1969 amendments, Congress not only enhanced its scheme to protect the public about the hazards of cigarettes smoking, but also sought to protect the public, *including youth,* from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.") (emphasis added); *see also*15 U.S.C. § 1334(b).

*6 Thus, according to the latest U.S. Supreme Court, Congress has expressly and directly addressed the issue of whether states can regulate tobacco advertising in an effort to protect the Country's youth by combating underage smoking, and the answer to this question is "no." States cannot seek to impose regulations on tobacco "advertising and promotion" in an effort to protect youth from exposure to such advertising, as Congress has already done so in banning all electronic advertising and in vesting the FTC with the authority to impose additional regulations. *Reilly's* holding therefore conflicts with that of *Mangini* on this critical issue, and this Court must follow Federal authority, especially from the highest Federal court, with respect to issues relating to Federal law. There is no question that in construing Federal statutes, and particularly, express preemption provisions in Federal statutes, state

courts are bound by the rulings of Federal courts. *General Motors Corp. v. City of Los Angeles,* 35 Cal.App.4 1736 (1995). *Reilly's* construction of the express preemption provision at issue here, 15 U.S.C. 1334(b), is therefore binding on this Court.

Further, in light of the Complaint's many references to the dangers and "health risks" of youth smoking and youth "addiction" to cigarettes, including its many citations to California statutes and policy (e.g., Business & Professions Code § 22950 (STAKE Act); Health & Safety Code § 118950) addressing this very subject (Complaint, ¶¶ 74-78, 89, 90, and 97), *Reilly* is highly analogous to this UCL action, as *Reilly* involved the validity of similar regulations issued under the unfair competition laws of a sister state to combat the alleged effects of tobacco advertising on underage smoking.

In their attempt to avoid *Reilly's* clear holding, Plaintiffs again point to *Mangini* and its finding that because Penal Code section 308 is found in a part of the Code containing legislation designed to protect minors from immoral activity, the California Legislature's intent and purpose, when it originally passed the statute in 1871, could not have possibly been motivated by a concern over the deleterious effect of smoking on California youths. However, as discussed above, *Mangini* did not consider the *effect* on the preempted field (as opposed to the purpose) of California-based UCL actions (like the instant one) that seek broad injunctive relief.

Moreover, under well-established Federal law, this Court must consider not only the purpose, but also the effect which the challenged state regulations or injunctions would have on the preempted field. (See Defendants' Supplemental Opposition Memorandum at 2 for a list of Federal as well as California authority supporting this conclusion.) Indeed, Plaintiffs have conceded that the Court must take into account the effect of the state law on the preempted field when considering the issue of preemption. Plaintiffs' Supplemental Opposition Memorandum, at 1 and 6 ("The Court in *Vango [Media, Inc. v. The City of New York,* 34 F.3d 68 (2d Cir.1994)], which involved a city law requiring cigarette advertisers to publish certain public health warnings, then found that considerations of the legislative finding and the *effects* of the state law related more to 'smoking and health' than to the proffered 'economic motivations." ') (emphasis added). And as explained above, the practical impact of a finding by this Court in favor of Plaintiffs would contravene Congressional intent to keep uniform, on a nation-wide basis, regulations on tobacco advertising and promotions based on smoking and health.

*7 Plaintiffs argue that state regulations which conflict with Federal law, but which were promulgated *after,* rather than *before,* Congress expressly preempted the field, are not subject to preemption. This argument is not persuasive. While courts have held that states cannot simply circumvent preemption by passing a mere legislative declaration that the state regulations are based on

concerns different from those underlying the Federal statute at issue and so do not frustrate the statute (*see Gade v, Nat'l Solid Wastes Management Ass'n,* 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), it is quite a different thing to find that states can avoid preemption based on the date the state act was passed because it shows that there was no intent to circumvent preemption. Plaintiffs have cited no authority, Federal or otherwise, supporting the proposition that preemption turns on proof of a state's intention to avoid preemption. Further, it is not surprising that no such authority exists as it would nullify the second part of the preemption test, that is, the consideration of the effect or impact of the state regulation on the preempted field.

Such a decision would also allow some states to circumvent preemption altogether while holding others strictly to it, depending entirely on the happenstance of when the act was passed. For instance, Plaintiffs contrast this case with *Reilly,* noting that in *Reilly* the Massachusetts regulations on tobacco advertising were passed after 15 U.S.C. 1334(b) was enacted, while California enacted Penal Code section 308 in 1871. This date is significant, Plaintiffs argue, because it shows that section 308 could not possibly be "based on smoking and health," since no one was aware back in 1871 that smoking was deleterious to one's health, as the *Mangini* Court correctly found. Thus, under Plaintiffs' analysis, the Massachusetts' regulations are preempted, but not the injunctions that would issue in this case under California law, because of the dates on which the laws were passed, even though the injunctions sought

here are motivated by the same concern of decreasing underage smoking (see the numerous references to youth smoking and health in the Complaint), are as broad and stifling as the Massachusetts regulations at issue in *Reilly,* and would have the same effect on the preempted field that *Reilly* found violative of section 1334(b). Surely, such an absurd result would not be countenanced by the U.S. Supreme Court.

Plaintiffs' argument also ignores the fact that Penal Code section 308 has been amended several times, and that, as Defendants point out, even as early as 1911, when the smoking age was raised from 16 to 18, the California Legislature was well aware of studies concluding that smoking was detrimental to the health of the State's youth. In addition, in 1988, the California Legislature once again amended section 308 to increase the penalties for violating the statute. More important, also in 1988, the Legislature added subsection c, which requires retailers who sell cigarettes to post the notice set forth in Business & Professions Code section 22952.

*8 As shown by the many citations to and quotation of Business & Professions Code section 22950 et seq., in Plaintiffs' Complaint, section 22950 expressly addresses the issue of smoking and health. In fact, by enacting section 22950, the California Legislature made very clear that it was well aware of the dangers of smoking, as it found and declared that "reducing and eventually eliminating the illegal purchase and consumption of tobacco by minors is critical to ensuring the long-term health of our state's citizens." Business & Professions Code § 22951. Later, the

Legislature also passed certain Health & Safety Code provisions, which also specifically address the state's concern of preventing minors from using tobacco, pointing out that it is among "the highest priorities of disease prevention for the State of California." Health & Safety Code § 25967(a)(11).

Further, a careful review of *Mangini* reveals that the Court issued the decision without the aid of any briefing on the two-part preemption analysis requiring consideration of both the purpose and the effect of the challenged state law or regulation. *Mangini* also did not consider the legislative history of section 308, but only its location in the Code, when it determined that the purpose behind the provision was to protect the morals of the State's youth rather than their health. Lastly, perhaps because it was not faced with First Amendment issues, *Mangini* did not consider the strictures of the *Brandenburg* test, see *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), on any ruling involving speech, when it stated that " 'the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to unfairly assist or advertise *illegal* conduct." *Mangini,* 7 Cal.4 at 1069 (emphasis added). (For more details, see analysis below and the Court's Ruling on the 1st Amendment SJM.)

As to the two-part preemption analysis, this Court cannot ignore that it has been fully briefed on this issue and that, regardless of its finding under the first part of the test (the "purpose" of section 308) as well as that of *Mangini* finding, application of the

second part of the test invariably leads to the conclusion that this action is preempted, as Plaintiffs here seek the imposition of "affirmative *requirements,*" or "negative *prohibitions,*" under state law, the very remedy which was found in *Cipollone* to be preempted by 15 U.S.C. 1334(b). *Cipollone,* 505 at 522 (emphasis in original). In fact, preemption is especially called for here since, again, this case seeks to ban not just one particular ad campaign (as in *Mangini*), but virtually all tobacco advertisement of the four alleged Youth Brands. In short, there can be no doubt that the imposition of such sweeping regulations would, in effect, create the very kind of conflicting, non-uniform regulatory patchwork that Congress intended to prevent through 15 U.S.C. 1334(b).

*9 Further, in light of the legislative history of section 308 (in particular the addition of subsection c and its direct reference to Business and Professions Code section 22950 et seq., and its findings of the hazards of youth smoking) and the fact that Plaintiffs are asking this Court to enforce section 308 *as it exists today,* it would be disingenuous for this Court to find that this action is not preempted because the regulations/injunctions it seeks are not based on "smoking and health." Plaintiffs' numerous references and citations to Business and Professions Code section 22950 et seq. and Health & Safety Code § 25967(a)(11) in their Complaint also belie their argument, as these citations expressly show that this action (if not section 308), is as much based on concerns "based on smoking and health," as the regulations at issue in *Reilly.*

Lastly, even if this Court were to accept Plaintiffs' argument that section 308 was originally motivated by a desire to protect the morals of the youth of this State and not their health, section 308's legislative history shows that since 1871, one of the purposes of the act as amended is based on smoking and health. And because "a state law is preempted whenever one of the purposes of a dual purpose or dual impact state law is a preempted one" (*Gade,* 505 U.S. at 106), this Court must find that the instant action is preempted.

Lastly, Plaintiffs argue that *Mangini, Cipollone* and *Reilly* all found that "[h]aving prohibited the sale and distribution of tobacco to minors, the State may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." *Reilly,* 533 U.S. at 552. This action, they contend, is therefore not preempted as it is ultimately based on California's recognized police power to enforce its criminal laws prohibiting the sale and distribution of tobacco products to minors, specifically Penal Code sections 308 (prohibiting the sale and distribution of tobacco products to minors) and 31 (aiding and abetting criminal conduct). Plaintiffs further assert that the crime of aiding and abetting the sale and distribution of cigarettes to minors, upon which the instant action is based, is an inchoate offense much like the other inchoate offenses *Reilly* enumerated as immune from preemption.

As explained below, however, Plaintiffs' section 308 case fails as a matter of law given that Plaintiffs have not introduced any evidence whatsoever of any violations of section 308. In addition, as explained in

the Court's Ruling on the 1 Amendment MSJ, Plaintiffs' UCL case is primarily based on the *"unlawful"* prong, and because Defendants' advertisement and promotional activities cannot be found to "incite imminent lawless action," Plaintiffs' aiding and abetting case does not pass constitutional muster, see *infra*.

In sum, *Reilly* and the Federal precedents requiring an analysis of the effect of the challenged state regulation on the preempted field control here. Therefore, Plaintiffs' arguments that this case is not preempted lacks merit, as such a finding would require this Court to disregard Federal precedent of the highest court in the land and commit reversible error.

C. *Plaintiffs' aiding and abetting case fails as a matter of law.*

*10 As noted above, the Court incorporates by reference herein its Ruling on the 1 Amendment MSJ, as it also addresses the validity of Plaintiffs' UCL action under the "unlawful" prong for aiding and abetting the distribution of cigarettes to minors.

[2] One of the dispositive issues in this case is whether Plaintiffs are required to submit admissible evidence on the identity of the perpetrators of the underlying crime (violation of Penal Code section 308). Plaintiffs argue that they need not submit any such evidence as it is not required to establish

Defendants' guilt as aiders and abettors of the crime of selling or distributing cigarettes to minors.

At first blush, Plaintiffs' proposition seems incongruent with both California criminal and civil law and a careful review of their proposition confirms the Court's initial impression. Logic and judicial prudence dictate that in order to prevail on a UCL action for unlawful business practice under Penal Code section 308 and Penal Code section 31 (aiding and abetting), Plaintiffs need to establish not only that the challenged action by the aider and abettor (here primarily Defendants' advertisement) satisfies the elements of the offense of aiding and abetting, but also that the underlying crime (violation of section 308 by retailers and/or minors) was committed on at least one occasion. Absent this requirement, Plaintiffs' action would simply rest on mere speculation that some retailers (who were allegedly aiding and abetted by Defendants) violated section 308, or in other words, that some retailers purposely sold cigarettes to customers who are minors fully knowing that the customers were minors and therefore prohibited by law from making the purchase. No matter how likely such a crime might seem to Plaintiffs or the public at large, no California court can take judicial notice of the commission of a crime, and impose liability, civil or otherwise, on a defendant based on such speculation or common belief.

Therefore, in order to maintain this action against Defendants for aiding and abetting the sale and distribution of cigarettes to minors, evidence of a

violation of section 308 by a principal is essential. It also reasonably follows that one cannot establish that a crime has been committed, especially the inchoate offense of aiding and abetting, without identifying the principal who actually committed the crime. A review of California law on this area further supports the Court's initial impression that proof of the identity of the perpetrator is required.

As Defendants point out, the law of aiding and abetting requires the State to prove that the defendant had "knowledge of the criminal purpose of the perpetrator" at the time the defendant allegedly acted to assist the identified perpetrator. *People v. Beeman,* 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984); *People v. Brady,* 190 Cal.App.3d 124, 235 Cal.Rptr. 248 (1987). Thus, California law necessarily assumes the presence of an identified perpetrator, as these elements cannot be established without proof of the perpetrator's existence. Moreover, in *People v. Singleton,* 196 Cal.App.3d 488, 241 Cal.Rptr. 842 (1987), the Court of Appeal directly addressed this issue and reversed a conviction of aiding and abetting precisely because the alleged principal was a "phantom figure about whom the jury had heard no evidence," as it could find no California decision which upheld a conviction for aiding and abetting where the principal was an unknown party. *Id.* at 493, 241 Cal.Rptr. 842 ("We cannot accept the notion that a defendant's conviction can rest solely on a theory of aiding and abetting, promoting, encouraging, or instigating a principal created from the whole cloth of pure speculation.").

*11 Plaintiffs cite *United States of America v. Barnett,* 667 F.2d 835 (9th Cir. 1982), for the proposition that evidence of the identity of the perpetrator need not be introduced to find a defendant guilty of aiding and abetting. However, the defendant in *Barnett* was convicted under Federal law, not California law-a point that Plaintiffs apparently believe is not important given their numerous citations to Federal cases to support their arguments regarding the state of California law on aiding and abetting-but which is, of course, critical in evaluating the applicability of the proffered authority. Further, while the Court recognizes that California law with respect to some legal questions is similar to or often indistinguishable from Federal law such that Federal law may be cited as controlling authority in California cases (*see, e.g.,* employment law issues), Plaintiffs have cited no authority that in the area of criminal law, Federal law and California law are co-extensive. In any event, even *Barnett* supports the position that while there is no " 'prerequisite to the conviction of the aider and abettor that the principal be tried and convicted or in fact even be identified" ' (*id.* at 841 (quoting Federal authority and thus Federal law)), evidence that the crime was actually committed is required. *Id.* at 841-42 ("As noted above, encouraging and counseling another ... as to how to commit a complex crime does not alone constitute aiding and abetting. If, however, the person so assisted or incited, *commits* the crime he was encouraged to perpetrate, his counselor is guilty of aiding and abetting.") (emphasis added).

In sum, under *Singleton,* California law, as opposed to Federal law, requires the identification of the perpetrator of the crime in order to convict an alleged aider and abettor pursuant to Penal Code section 31. Moreover, even if the foregoing statement is not a correct interpretation of California law, it is clear that both California law and Federal law require evidence of the actual commission of the crime to support a conviction of aiding and abetting. As to California law, *Singleton's* holding is bolstered by numerous other California decisions upholding convictions for aiding and abetting where the principal was known and there was no doubt that the underlying crime had actually been committed. *See id.* at 143, 241 Cal.Rptr. 842; see also this Court's analysis of this issue in the Court's Ruling on the 1 Amendment SJM. Further, Defendants are correct that not one case cited by Plaintiffs supports the dubious proposition that California law (or even Federal law) does not require evidence that the crime has been actually committed in order to convict a defendant of aiding and abetting the commission of the crime.

It also bears mention that while Plaintiffs' general allegations can be read to allege violations of both Penal Code sections 308(a) (prohibiting the sale and distribution of cigarettes to minors) and 308(b) (prohibiting the purchase by minors of cigarettes), in their first cause of action (under the UCL), Plaintiffs only allege violations of section 308(a), and not violations of 308(b). Complaint, ¶ 145. Therefore, it was incumbent on Plaintiffs to adduce admissible evidence of identified retailers or others who have

violated section 308(a) to support their UCL action against Defendants for aiding and abetting these alleged violations.

*12 [3] In any event, even if Plaintiffs were allowed to amend their Complaint to allege violations of section 308(b) and submit, for example, the declarations of the named class representatives that they purchased cigarettes illegally and were induced to do so by Defendants' advertising and promotional campaigns, Plaintiffs' case would still fail. This is because even though such an amendment and evidence would allow Plaintiffs to establish a violation(s) of Penal Code section 308(b) and identify the principals (the named class representatives), the conduct of Defendants on which Plaintiffs' case is based is constitutionally protected under the *Brandenburg* test. *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

As discussed in the Court's Ruling of the 1 Amendment SJM, the advertisement and promotional materials that Plaintiffs claim to aid and abet section 308 violations constitute commercial speech. However, it is well established that "[s]peech directed to action at some indefinite time in the future will not satisfy the [*Brandenburg*] test." *McCollum v. CBS, Inc.,* 202 Cal.App.3d 989, 249 Cal.Rptr. 187 (1988) (citing *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)); *see also Ashcroft v. The Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (noting that the words "We'll take the f g

street again" or "We'll take the f g street again later" shouted to a crowd during an antiwar demonstration constituted "nothing more than advocacy of illegal action at some indefinite future time"); and *Rockwood v. City of Burlington,* 21 F.421. Supp.2d 411, (D.Vt.1988).

Moreover, there is no question that the *Brandenburg* test is applicable here. Even Plaintiffs' own cited authorities show that in cases involving inchoate *crimes* based on speech, the language used to advocate the crime must be "evaluated in light of the two-part *Brandenburg* test ((1) its incitement to imminent lawless action" and "(2) its likelihood of producing such action")) in order to uphold a conviction. *E.g., People v. Rubin,* 96 Cal.App.3d 968, 158 Cal.Rptr. 488 (1979) (applying the *Brandenburg* test in a case for solicitation of murder).

The Court further notes that the California cases Plaintiffs cite in support of the proposition that "indirect" encouragement suffices to find a defendant guilty of aiding and abetting, (*e.g., People v. Nguyen,* 21 Cal.App.4 518, (1993)), do not discuss the *Brandenburg* test and focus on other issues (such as, the intent required to convict an aider and abettor of criminal acts that were the natural and probable consequence of another criminal act). Further, these cases often refer to the *action* taken by the defendant, not his speech, when noting that any action, directly or indirectly, that facilitates or encourages the crime is sufficient. *E.g., Nguyen,* 21 Cal.App.4 at 530 (noting that the actions of the aider and abettor "taken with the intent that the act be encouraged or

facilitated, are sufficient to impose liability on him for an reasonably foreseeable offense committed as a consequence by the perpetrator"). In fact, the court's language in stating the rule (i.e., "A person is 'concerned' and hence guilty as an aider and abettor if, with the requisite state of mind, that person in any way, directly or indirectly, aided the actual perpetrator by acts or encouraged the perpetrator by words or gestures.") should be interpreted, in light of *Brandenburg,* as meaning that only indirect acts, not indirect words, suffice. *Id.* at 529.

*13 In any event, Plaintiffs' evidence of aiding and abetting retailers and/or minors to violate Penal Code section 308 does not satisfy the *Brandenburg* test, as there is nothing in Plaintiffs' evidence which can be characterized as an order or command to anyone to violate Penal Code section 308, at any specific time, much less immediately. Moreover, as to Penal Code section 308(b), there are no advertisements stating "Kids, don't wait to start enjoying the smooth pleasure of Camel. Get your Camels here; get your Camels now." At best, Plaintiffs' evidence shows indirect encouragement or incitement for retailers or minors to take action, *i.e.,* sell or purchase cigarettes, respectively, *at some time in the future.* As a result, Defendants cannot be held liable as aiders and abettors, since their speech is protected under the First Amendment. *McCollum,* 202 Cal.App.3d at 1003, 249 Cal.Rptr. 187.

Had Plaintiffs presented evidence, for instance, that Defendants entered into certain agreements with retailers or offered any kind of economic incentive to

retailers to encourage them not to "card" as faithfully as the law requires, or even circumstantial evidence allowing a reasonable inference that such an arrangements existed, then Plaintiffs' case would have merit under *Reilly*. But Plaintiffs have apparently dropped their conspiracy claims (as they do not present any arguments in their opposition memoranda in support of such a theory) and have failed to support with any evidence many of the allegations that they make in their Complaint (e.g., allegations that Defendants have giving children "free packs of cigarettes" or have invited children to purchase cigarettes "to obtain an attractive T-shirt" (see, Complaint, ¶ 53)) that would support any inchoate theory of liability Therefore, Plaintiffs' UCL claim under the "unlawful" prong for aiding and abetting violations of Penal Code section 308 fails as a matter of law. CCP § 437c.

D. *Plaintiffs' UCL action under the "unfair" and "misleading" prongs, including their Lights theory, is also preempted.*

[4] With regard to their UCL claim under both the "unfair" and "misleading" prongs, Plaintiffs argue that " *Reilly* is inapposite here because this case involves both unlawful conduct targeting minors to smoke as well as affirmative misrepresentations in advertising ('Lights') and to the public at large (false testimony to Congress, et al.) matters that were specifically excluded from the scope of the *Reilly* decision." Plaintiffs' Opposition Memorandum re Preemption, at 2:15-17. While this argument at first

blush appears to have merit, a closer examination of Plaintiffs' claims reveals otherwise and shows that Plaintiffs' "unfair" and "misleading" claims under the UCL are preempted.

As noted above, Plaintiffs' "unfair" and "misleading" or "deceptive" UCL claims are primarily based on their proffered advertising evidence, which the Court has found insufficient to support these claims, as the ads do not contain any misrepresentations (or at least, Plaintiffs have adduced none) about the product and may be viewed as misleading only insofar as they associate smoking with healthy activities, smart and beautiful people and other positive imagery. As explained in the Court's Ruling on the 1 Amendment MSJ, however, the Court finds that the ads are constitutionally protected under the First Amendment, and therefore, cannot form the basis of this UCL action. And as the Court explains here, see *supra,* an analysis of the effect which the injunctions that Plaintiffs seek are likely to have on the preempted field, preempts Plaintiffs' "unfair" or "misleading" or "deceptive" UCL claims.

*14 As to Plaintiffs' other evidence, specifically Plaintiffs' evidence of Defendants' payment to store owners to place cigarettes in self service displays accessible to minors, the Court finds that they offer no assistance to Plaintiffs. As noted by the Eighth Circuit in *Jones v. Vilsack,* 272 F.3d 103 (8 Cir.2001), " '[p]romotional expenditures" ' by cigarette manufacturers related to " 'point-of-purchase displays" ' are types of cigarette promotional activities within the meaning of FCLAA) (quoting

1994 Surgeon General's Report). Therefore, Plaintiffs' claims, which are in part based on these promotional expenditures, and which seek the imposition of state enacted requirements or prohibitions, are preempted under 15 U.S.C. section 1334(b).

[5] As to Plaintiffs' theory regarding cigarettes marketed with the descriptor or name "Light" or "Lights" (hereinafter "Lights"), this theory appears to be based on the argument that the term in and of itself is deceptive because studies show that smokers who smoke Lights compensate for the lower nicotine in the cigarettes by smoking more cigarettes or inhaling more deeply. Plaintiffs' argument, however, ignores the fact that there is no dispute that the packages of all of Defendants' cigarettes contain the warning mandated by Congress to the effect that cigarettes are harmful to one's health. Thus, to be deceived by the term "Lights," smokers would have to ignore this warning altogether. They would also have to be unaware that their smoking habits have changed, i.e., that they are smoking more cigarettes or taking deeper puffs, in order to be deceived by the term.

More important, with respect to the preemption issue, the Court cannot disregard that, in essence, Plaintiffs' argument is based on the notion that Defendants have failed to warn the public about the tendency of smokers to change their smoking habits (as explained above) when smoking Lights. However, with regard to "[a]dditional statements," 1334(a) expressly states that: "[a] statement relating to smoking and health, other than the statement

required by section 4 of this Act [15 U.S.C. 1333] shall *not* be required on *any* cigarette package." 15 U.S.C. 1334(a) (emphasis added). Plaintiffs' theory is therefore subject to the FCLAA's preemption provision.

It also bears noting that not all Defendants' advertising of their Lights brands which Plaintiffs have submitted to support their UCL "unfair" and "deceptive" advertising case actually supports Plaintiffs' case. Indeed, it appears that some of Defendants' ads do contain a warning to the effect that Lights are not necessarily safer cigarettes. Plaintiffs' Exhibit 98B (Bates No. C-MAG-000632.48) print ad containing the following language: "Kool Natural Lights are a special blend of tobaccos and natural menthol with another natural flavors for a smooth, fresh taste. *We're not saying these cigarettes are safer than other cigarettes,* but we think you will enjoy the perfectly balanced taste." (emphasis added)

*15 Another point the Court cannot ignore is that Plaintiffs have presented no evidence connecting Lights with underage smoking. In fact, Plaintiffs' experts express opinions supporting the inference that youth do not smoke Lights. Declaration of Cornelia Pechmann in Opposition to Motion for Summary Judgment (Based on the First Amendment and on Federal Preemption), ¶ 6 ("I find that the ad themes used by 'adult' and 'youth' brands is very different. The ' *adult*' ad themes include premium tobacco taste, low cost, and *low tar.*" (emphasis added); *see also* declaration of William Farone In Opposition to Motion for Summary Judgment (First

Amendment and Federal Preemption), ¶ 18 (associating the term "Lights" with "low tar cigarettes").

This conflict in Plaintiffs' argument creates an evidentiary problem for Plaintiffs given that, if low tar cigarettes bearing the term "Lights" as part of the brand name are smoked by *adults* (as opposed to minors), then Plaintiffs' Lights theory is outside the scope of this litigation. This is because, as Defendants point out, the Court certified the class as involving claims of false advertising and marketing "targeting the putative class" (Court's ruling, dated November 30, 2000 on Plaintiffs' motion for class certification, at 2 (emphasis added)), which consists of persons who, when they were *minors,* smoked cigarettes in California between April 2, 1994 through December 31, 1999. In other words, in view of Plaintiffs' evidence that low tar cigarettes bearing the name "Lights" are smoked by adults and that Defendants' adult ad themes are different than their youth ad themes, Plaintiffs were required to submit evidence showing that some class members (i.e., a percentage of class members greater than zero) smoke the Lights version of the four Youth Brands, in order to substantiate the position that it was likely that class members were deceived by the term "Lights."

Plaintiffs, however, failed to do so, just as they failed to introduce any evidence of violations of Penal Code sections 308(a) and 308(b). And as noted above, the Court cannot simply assume that violations have occurred or that youth smoke Lights, especially given Plaintiffs' own evidence to the contrary.

In sum, contrary to Defendants' assertion, Plaintiffs' Light theory is not beyond the claims certified by this Court since if properly supported, the theory can be viewed as an example, i.e., evidence, supporting Defendants' broad claim of false advertising to youth. But Plaintiffs have not only failed to support their theory, they have actually presented evidence against it.

In any event, for the reasons noted above, Plaintiffs' Lights theory is preempted, as falling under 15 U.S.C. 1334(a).

E. *Defendants' objections to Plaintiffs' Exhibits Nos. 64 pursuant to Civil Code section 47(b), and to Exhibits 64 and 69 pursuant to Civil Code section 1714.45 and* Naegele v. R.J. Reynolds Tobacco Co., *2002 LEXIS 5024 (Cal. Aug. 5, 2002), and* Myers v. Phillip Morris Companies, *2002 Cal. LEXIS 5023 (Cal. Aug. 5, 2002) are sustained.*

*16 The Court declines to rule on *all* of the parties' specific evidentiary objections, excepting (as noted below) Defendants' objections to Plaintiffs' Exhibits 64 and 69 pursuant to Civil Code section 1714.45, which are critical to the central issues in this case. In so ruling, the Court has relied on the recent California Supreme Court decisions, *Naegele v. R.J. Reynolds Tobacco Co.,* 2002 LEXIS 5024 (Cal. Aug. 5, 2002), and *Myers v. Phillip Morris Companies,* 2002 Cal. LEXIS 5023 (Cal. Aug. 5, 2002), on the admissibility of this category of evidence, specifically

evidence of wrongdoing by Defendants during the time they were immune from prosecution under Civil Code section 1714.45. As to all other objections, the parties should note that the Court has disregarded all evidence that it found to be incompetent or inadmissible. *See Biljac Associates v. First Interstate Bank,* 218 Cal.App.3d 1410, 267 Cal.Rptr. 819 (1990).

In their attempt to defeat Defendants' motions for summary judgment based on the First Amendment and Federal preemption, Plaintiffs repeatedly argue that this case "presents three basic claims." The first involves claims for specific ad campaigns, which they allege were created and used to intentionally target minors and which support their claim under the "unlawful" prong of the UCL for violations of Penal Code section 308(a). As explained above, this claim fails for lack of evidence (no identification of principal or proof of commission of actual crime) *and* in light of *Reilly.*

Plaintiffs' second claim involves what Plaintiffs call "a disinformation campaign to neutralize messages from parents, schools and public health officials concerning the fact that smoking was dangerous and addictive," based on evidence that Defendants' CEO lied under oath before Congress and made certain allegedly "false statements in newspapers" about whether cigarettes are dangerous and addictive. (Opposition Memorandum re Preemption, at 1:27-2:2). The third claim involves allegations of misrepresentation (or "affirmative misrepresentations in advertising," for "falsely advertising variants of their Youth Brands using the

term 'Lights" '). Opposition Memorandum re First Amendment, at 2:2; Opposition Memorandum re Preemption, 2:16. As noted above, the Lights claim fails as preempted under 15 U.S.C. § 1334(a).

The Court therefore turns to Plaintiffs' UCL "unfair" and "deceptive" claim(s) (i.e., the second claim, presumably under both sections 17200 and 17500), which is apparently based both on "false representations in advertising and deceptive conduct occurring outside advertising," which Plaintiffs assert is not preempted under 15 U.S.C. section 1334(b). Opposition Memorandum re Preemption, at 19:27-1:20.

First, as noted above, this claim was also expressly held to be preempted by *Cipollone,* as recognized by *Mangini,* see *supra.* This notwithstanding, the Court finds that Plaintiffs' advertising evidence does not support any of their claims, as Defendants' print advertising contains the required warning, are not misleading for that reason and others, relate to a lawful activity, and the injunctions sought by Plaintiffs are not narrowly tailored to allow them to pass the *Central Hudson* test (see the Court's Ruling on the 1 Amendment SJM). Further, even if one were to consider Defendants' use of the term "Lights" as part of a second theory, at worst, the use of the term "Lights" is merely potentially misleading, which means that the *Central Hudson* test applies, rendering the theory untenable under the fourth prong (see above, and the Court's Ruling on the 1 Amendment SJM).

*17 Second, with regard to the evidence of "deceptive conduct occurring outside advertising," the Court notes that the evidence Plaintiffs have submitted is scanty and consists of two exhibits (specifically, Plaintiffs' Exhibit Nos. 64 and 69). Defendants object to this evidence on various grounds.

[6] With regard to Exhibit 64, Defendants' objection based on California Civil Code section 47(b) is sustained, as this Exhibit consists of a video tape of statements Defendants' executives made in a legislative proceeding before Congress.

[7] Defendants further object to Exhibit 64 and to Exhibit 69 pursuant to Civil Code section 1714.45 ("Immunity Statute") and *Naegele v. R.J. Reynolds Tobacco Co.,* 2002 LEXIS 5024 (Cal. Aug. 5, 2002), and *Myers v. Phillip Morris Companies,* 2002 Cal. LEXIS 5023 (Cal. Aug. 5, 2002). These objections are also sustained.

In arguing that the Immunity Statute is inapplicable here, Plaintiffs state that it applies only to tort claims seeking damages for personal injuries, and therefore does not bar the instant action under the UCL. However, throughout their opposition memoranda and in their opposition separate statements, Plaintiffs repeatedly refer to Defendants' advertising and non-advertising statements about cigarettes as false, fraudulent, deceptive and misleading. The Court also cannot ignore (1) that the UCL borrows from other statutes, most notably statutes prohibiting all forms of fraud, and (2) that the main difference between a UCL claim for unfair and deceptive

conduct or advertising and a tort-based fraud action is that, with regard to the former, a plaintiff is not required to show actual deceit or justifiable reliance, but only a likelihood of deception. Therefore, the legal predicate of Plaintiffs' UCL action is the duty not to deceive, and as such, it is in essence no different that the fraud claim brought in *Naegele.*

In *Naegele,* the Supreme Court held that the Immunity Statute barred all *fraud* claims based on allegations that the tobacco companies " 'disseminate[d] deceptive, erroneous, misleading and false statements" ' about the " 'health hazards" ' and " 'addictive nature" ' of smoking cigarettes. *Naegele,*2002 LEXIS 5024, at 10. The only fraud claims it did not bar were those based on allegations that defendants increased the health risks of smoking by adding chemicals to the tobacco since such allegations are based on the theory that "defendants exposed plaintiff to a risk *other than* those inherent in tobacco products." *Id.* at 9 (emphasis in original).

Here, Plaintiffs' fraud allegations are not based on theories involving additives or other risks not inherent in tobacco products. Indeed, Plaintiffs' fraud based theories are based on allegations regarding Defendants' conduct during the immunity period that the *Naegele* Court held to be non-actionable. *Id.* In this regard, Defendants are correct that the gist of Plaintiffs' fraud-based UCL claims depend upon the inherent dangers and addictiveness of cigarettes in causing "injury or death" within the meaning of the Immunity Statute, as Defendants' statement could not be adjudged to be deceptive or fraudulent or

unfair without accepting the proposition that cigarettes cause "injury or death."

*18 Thus, while the *Naegele* Court refers to "products liability" actions when addressing the scope of the Immunity Statute, it obviously meant to include all tort actions and non-tort actions (such as the instant UCL case) based on tort theories like fraud and misrepresentation (whether intentional or negligent). *Id.* at 11 ("Regarding defendants' conduct during the statutory immunity period, we conclude that the Immunity Statute bars plaintiff's claims, *however labeled,* where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products such as cigarettes.") (emphasis added). As Defendants point out, any other interpretation would turn the law on its head, as it would mean that plaintiffs who have suffered actual physical injury or death due to tobacco company fraud during the Immunity period could not recover, while a member of the instant class who is alleging no injury, other than being induced to smoke, could recover through the remedy of restitution the cost of the cigarettes purchased during the class period simply because he is a member of a UCL class action.

Lastly, while Plaintiffs may be correct that the Immunity Statute cannot be read to provide immunity to illegal activity, Plaintiffs have proffered Exhibits 64 and 69 in support of their case under the "unfair" and "deceptive" prongs of the UCL (see Plaintiffs' Separate Statement in Opposition re First Amendment and Federal Preemption, No. 5 ("DISPUTED: " 'Plaintiffs contend that all of the

advertising and promotional activities by the Defendants which comprise the above campaigns [for Youth Brands], when viewed *in conjunction* with the public representations by the Defendants wherein Defendants deny the addictive nature of cigarettes ... along with the suppression of material facts, are deceptive, unfair and unlawful," ' quoting Plaintiffs' discovery responses) (emphasis added). Therefore, as to those theories or claims, Defendants' objections are sustained.

III. CONCLUSION

As a result, and for all the foregoing reasons, this Court must dismiss Plaintiffs' case, as Plaintiffs' UCL claims are either preempted under 15 U.S.C. sections 1334(a) or 1334(b) or are based on inadmissible evidence under Civil Code section 47(b) or Civil Code section 1714.45.

IT IS SO ORDERED.

15 U.S.C.:

§ 1331. Congressional declaration of policy and purpose

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C.:

§ 1333. Labeling; requirements; conspicuous statement

(a) Required warnings; packages; advertisements; billboards

(1) It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes

the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(2) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised (other than through the use of outdoor billboards) within the United States any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(3) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised within the United States through the use of outdoor billboards any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.

SURGEON GENERAL'S WARNING: Pregnant Women Who Smoke Risk Fetal Injury And Premature Birth.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(b) Conspicuous statement; label statement format; outdoor billboard statement format

(1) Each label statement required by paragraph (1) of subsection (a) of this section shall be located in the place label statements were placed on cigarette

packages as of October 12, 1984. The phrase "Surgeon General's Warning" shall appear in capital letters and the size of all other letters in the label shall be the same as the size of such letters as of October 12, 1984. All the letters in the label shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package.

(2) The format of each label statement required by paragraph (2) of subsection (a) of this section shall be the format required for label statements in cigarette advertising as of October 12, 1984, except that the phrase "Surgeon General's Warning" shall appear in capital letters, the area of the rectangle enclosing the label shall be 50 per centum larger in size with a corresponding increase in the size of the type in the label, the width of the rule forming the border around the label shall be twice that in effect on October 12, 1984, and the label may be placed at a distance from the outer edge of the advertisement which is one-half the distance permitted on October 12, 1984. Each label statement shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material in the advertisement.

(3) The format and type style of each label statement required by paragraph (3) of subsection (a) of this section shall be the format and type style required in outdoor billboard advertising as of October 12, 1984. Each such label statement shall be printed in capital letters of the height of the tallest letter in a label statement on outdoor advertising of the same dimension on October 12, 1984. Each such label

statement shall be enclosed by a black border which is located within the perimeter of the format required in outdoor billboard advertising of the same dimension on October 12, 1984, and the width of which is twice the width of the vertical element of any letter in the label statement within the border.

(c) Rotation of label statement; plan; submission to Federal Trade Commission.

(1) Except as provided in paragraph (2), the label statements specified in paragraphs (1), (2), and (3) of subsection (a) of this section shall be rotated by each manufacturer or importer of cigarettes quarterly in alternating sequence on packages of each brand of cigarettes manufactured by the manufacturer or importer and in the advertisements for each such brand of cigarettes in accordance with a plan submitted by the manufacturer or importer and approved by the Federal Trade Commission. The Federal Trade Commission shall approve a plan submitted by a manufacturer or importer of cigarettes which will provide the rotation required by this subsection and which assures that all of the labels required by paragraphs (1), (2), and (3) will be displayed by the manufacturer or importer at the same time.

(2)(A) A manufacturer or importer of cigarettes may apply to the Federal Trade Commission to have the label rotation described in subparagraph (C) apply with respect to a brand style of cigarettes manufactured or imported by such manufacturer or importer if--

(i) the number of cigarettes of such brand style sold in the fiscal year of the manufacturer or importer preceding the submission of the application is less than one-fourth of 1 percent of all the cigarettes sold in the United States in such year, and

(ii) more than one-half of the cigarettes manufactured or imported by such manufacturer or importer for sale in the United States are packaged into brand styles which meet the requirements of clause (i).

If an application is approved by the Commission, the label rotation described in subparagraph (C) shall apply with respect to the applicant during the one-year period beginning on the date of the application approval.

(B) An applicant under subparagraph (A) shall include in its application a plan under which the label statements specified in paragraph (1) of subsection (a) of this section will be rotated by the applicant manufacturer or importer in accordance with the label rotation described in subparagraph (C).

(C) Under the label rotation which a manufacturer or importer with an approved application may put into effect each of the labels specified in paragraph (1) of subsection (a) of this section shall appear on the packages of each brand style of cigarettes with respect to which the application was approved an equal number of times within the twelve-month period beginning on the date of the approval by the Commission of the application.

(d) Application; distributors; retailers

Subsection (a) of this section does not apply to a distributor or a retailer of cigarettes who does not manufacture, package, or import cigarettes for sale or distribution within the United States.

15 U.S.C.:

§ 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C.:

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

15 U.S.C.:

§ 1336. Authority of Federal Trade Commission; unfair or deceptive acts or practices

Nothing in this chapter (other than the requirements of section 1333 of this title) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

California Business & Professional Code:

§ 17200. Unfair competition; prohibited activities

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17203. Injunctive Relief--Court Orders

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

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SUPREME COURT

No. 07-740

IN THE

Supreme Court of the United States

DEVIN DANIELS; BRYCE CLEMENTS; DAIMON FULLERTON; NICOLE MORROW; AND MAREN BETH SANDLER,

Petitioners,

v.

PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO CO.; BROWN & WILLIAMSON HOLDINGS, INC.; AND LORILLARD TOBACCO CO.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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RULE 29.6 STATEMENT

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., a publicly held corporation. Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) holds more than 10% of the stock of Reynolds American Inc.

Effective July 30, 2004, a transaction was completed whereby R.J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business. Effective August 2, 2004, Brown & Williamson Tobacco Corporation, a Delaware corporation, changed its name to Brown & Williamson Holdings, Inc. Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some publicly-held securities are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries, Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C., have issued pub-

licly-owned bonds. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 8

I. The California Supreme Court's Preemption Holding Does Not Raise Any Conflict and Simply Applies This Court's Controlling Decision in *Lorillard* to the Specific Facts of This Case 9

A. *Lorillard* Settled the Preemption Question Presented Here 10

B. The Opinion Below Does Not Conflict with Any Decision of this Court or of Any Other Appellate Court 12

C. Because the California Supreme Court's Decision to Overrule *Mangini* Also Rested on Changes in State Law, this Case Presents a Poor Vehicle for Reviewing Any Preemption Issue 15

D. The Opinion Below Does Not Give Respondents a "License" to Engage in Youth Marketing 17

II. The California Supreme Court's First Amendment Holding Correctly Applies Well-Settled Law to the Facts of this Case 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Robertson,
520 U.S. 83 (1997) 6

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 3, 14

Brown v. Brown & Williamson Tobacco Corp.,
479 F.3d 383 (5th Cir. 2007) 14

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) ..... passim

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 2, 3, 13, 14

Dunagin v. City of Oxford,
718 F.2d 738 (5th Cir. 1983) 21

English v. General Elec. Co.,
496 U.S. 72 (1990) 17

Gade v. National Solid Wastes Management Assn.,
505 U.S. 88 (1992) 16, 17

Good v. Altria Group, Inc.,
501 F.3d 29 (1st Cir. 2007), *cert. granted*,
76 U.S.L.W. 3240 (Jan. 18, 2008) 14, 15, 16

Greater New Orleans Broadcasting Assn. v. United States,
527 U.S. 173 (1999) 21

In re Tobacco Cases II,
No. SDSC 719446, 2002 WL 31628649 (Cal. Super. Ct. Nov. 22, 2002) 4, 6, 19, 23

CASES—Continued

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) ..... passim

Mangini v. R.J. Reynolds Tobacco Co.,
7 Cal. 4th 1057, 875 P.2d 73 (1994) ..... passim

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,
545 U.S. 913 (2005) 22

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,
116 Cal. App. 4th 1253,
11 Cal. Rptr. 3d 317 (2004) 17

Pitt News v. Pappert,
379 F.3d 96 (3d Cir. 2004) 23

PLCM Group v. Drexler,
22 Cal.4th 1084, 997 P.2d 511 (2000) 6

Rockwood v. City of Burlington,
21 F. Supp. 2d 411 (D. Vt. 1998) 21

Thompson v. Western States Med. Ctr.,
535 U.S. 357 (2002) 23

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 21

STATUTES

7 U.S.C. § 136v(b) 14

15 U.S.C. § 1331 ..... 1, 2

15 U.S.C. § 1333 2

15 U.S.C. § 1334(b) 2, 10

15 U.S.C. § 1335 2

15 U.S.C. § 1336 ..... 2, 17

Cal. Bus. & Prof. Code § 17200 5

STATUTES—Continued

Cal. Penal Code § 308 ..... passim

Mass. Gen. Laws, ch. 93A, § 2 4

Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 10

ADMINISTRATIVE DECISIONS

In re: R.J. Reynolds Tobacco Co., 127 F.T.C. 49 (1999) 17

INTRODUCTION

Petitioners, representing a certified class of Californians who smoked cigarettes as minors, seek review of the California Supreme Court's unanimous determination that their state-law challenge to Respondents' cigarette advertising is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (FCLAA), and violates the First Amendment. The Petition presents no cert-worthy issue and should be denied.

The underlying preemption issue raised by Petitioners was specifically addressed and resolved by this Court seven years ago in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The California Supreme Court's ruling simply conformed to *Lorillard* and overruled a prior inconsistent decision of that court. Beyond that, the decision below merely applies *Lorillard*'s preemption holding and settled First Amendment principles to the particular facts of this case, as presented by the parties on summary judgment after extensive discovery. The eleven judges below who have reviewed this case—in the trial court, the California Court of Appeal, and the California Supreme Court—all unanimously agreed that Petitioners failed to present sufficient evidence to establish a viable non-preempted claim. In sum, there is no split of authority on the preemption or First Amendment points, and Petitioners' factbound challenge to the California Supreme Court's correct application of settled law to this case does not warrant this Court's review.

STATEMENT

1. FCLAA creates "a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard*, 533 U.S. at 541. As this Court has

explained, the purpose of this federal scheme is two-fold: (1) "to inform the public adequately about the hazards of cigarette smoking," and (2) "to protect the national economy from interference due to diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health." *Id.* at 542-43 (citing 15 U.S.C. § 1331); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 514 (1992).

Congress sought to achieve these objectives by enacting a set of interrelated provisions that comprehensively address the subject of cigarette advertising, promotion, and labeling. In its current form, FCLAA requires manufacturers to include statutorily prescribed health warnings on all cigarette packages sold in the United States (15 U.S.C. § 1333); bans all radio and television advertising of cigarettes (*id.*, § 1335); and confirms the authority of the Federal Trade Commission (FTC) to regulate "unfair or deceptive acts or practices in the advertising of cigarettes" (*id.*, § 1336).

To further its stated goal of protecting the national economy from diverse and non-uniform regulations, Congress included an express preemption provision, which provides in relevant part:

> "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

15 U.S.C. § 1334(b). The "sweeping language" of this provision reflects Congress' intent to go beyond the subject of labeling by "further preclud[ing] States or localities from imposing *any* requirement or prohibi-

tion based on smoking and health with respect to the advertising and promotion of cigarettes." *Lorillard*, 533 U.S. at 542 (emphasis added).

2. a. This Court first construed the scope of FCLAA's preemption provision in *Cipollone*, which involved a personal-injury suit brought by an individual smoker. 505 U.S. at 509-10. There, the Court held that common-law tort claims impose "requirement[s] or prohibition[s]" within the meaning of FCLAA, and are therefore preempted to the extent that they are applied "with respect to ... advertising or promotion" and are "based on smoking and health." 505 U.S. at 520-24 (plurality opinion); *see also id.* at 548 (opin. of Scalia, J.). A plurality of four Justices held that a common-law damages claim that imposed obligations with respect to advertising was "based on smoking and health"—and therefore preempted—if the *"legal duty that is the predicate"* of the particular claim is "based on smoking and health." *Id.* at 524 (emphasis added). Applying this standard, the plurality concluded that several of the plaintiffs' common-law claims were preempted, while others were not. *Id.* at 524-30.[1]

b. This Court again addressed the meaning of the "based on smoking and health" clause in *Lorillard*, which held that FCLAA preempted Massachusetts

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[1] Applying a broader reading of the phrase "based on smoking and health," two Justices concurred in the plurality's judgment that certain claims were preempted. 505 U.S. at 544 (opin. of Scalia, J.). The remaining Justices concurred in the plurality's judgment that certain other claims were not preempted, based on their threshold view that common-law claims did not impose "requirement[s] or prohibition[s]" at all. *Id.* at 543 (opin. of Blackmun, J.). As noted above, a majority of the Court in *Cipollone* rejected this latter view, and the Court has since reaffirmed the majority's holding in *Cipollone* on that specific point. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

regulations (adopted pursuant to the State's generally applicable consumer protection statute, Mass. Gen. Laws, ch. 93A, § 2) that significantly restricted the placement of cigarette advertising in order to protect minors from exposure to it. 533 U.S. at 547-51. The Court rejected Massachusetts' "narrow construction" of the clause, *id.* at 547, holding that the regulations were "based on smoking and health" because the underlying concern about minors and cigarette advertising was inextricably "intertwined with the concern about cigarette smoking and health," *id.* at 548, and "inevitably motivated by concerns about smoking and health," *id.* at 550. The Court also held that a virtually identical set of regulations that were applicable only to the advertising of cigars and smokeless tobacco products (and thus outside of FCLAA's preemptive scope) violated the First Amendment. *Id.* at 556-67. Although the Court held that "the State's interest in preventing underage tobacco use is substantial, and even compelling," the regulations were "more extensive than necessary" to advance that interest. *Id.* at 564-65.

3. More than three years before this Court decided *Lorillard*, Petitioners brought this class action in California state court on behalf of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994 and December 31, 1999." Pet. App. 4a. The complaint alleged that Respondents undertook "systematic advertising efforts which appeal[ed] not only to adults, but also to children under the age of 18." *Id.* at 33a. In particular, the complaint averred that Respondents used "positive images" to make smoking appear "'glamorous,' 'cool,' 'strong,' 'macho,' 'tough,' or 'sophisticated.'" *In re Tobacco Cases II*, No. 719446, 2002 WL 31628649, at *1-*2 (Cal. Super. Ct.

Nov. 22, 2002); *see also* Pet. App. 106a, 86a.[2] Petitioners attached to the complaint several hundred magazine advertisements that they sought to challenge under California's unfair competition law. *See* Appellants' Appendix in the Cal. Ct. of App. at 51-447. In addition, the complaint alleged that Respondents placed such advertising in magazines with substantial youth readership (which, on the record at summary judgment, turned out to mean publications such as *Cosmopolitan*, *GQ*, *Rolling Stone*, *Vogue*, and *Vanity Fair*). *Id.* at 10-20; *see also* Respondents' Supp. Appendix in Cal. Ct. of App. at 831. Petitioners disavowed any injunctive relief, and instead sought restitution of all moneys spent for their illegal under-age cigarette purchases. *See* Appellants' Appendix in Cal. Ct. of App. at 37, 7909.

Based on these allegations, Petitioners asserted causes of action under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (UCL). The UCL authorizes a private right of action for "unfair competition," which the statute defines to include, *inter alia*, "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Although Petitioners did not contend that Respondents (who do not sell cigarettes at retail) had themselves unlawfully sold cigarettes to minors, Petitioners alleged that Respondents' *advertising* violated the UCL because it allegedly was intended to induce others to violate Cal. Penal Code § 308, which prohibits the sale of tobacco to minors. Pet. App. 5a, 34a.

After extensive discovery, Respondents moved for

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[2] The Appendix to the Petition includes the trial court's order granting summary judgment to Respondents on preemption grounds, but it omits the trial court's order granting summary judgment on First Amendment grounds.

summary judgment on the grounds that Petitioners' youth advertising claim (1) was preempted by FCLAA's express preemption provision and (2) impermissibly burdened commercial speech protected by the First Amendment. On November 22, 2002, the trial court granted summary judgment to Respondents on both grounds. Pet. App. 78a-116a; *In re Tobacco Cases II*, 2002 WL 31628649. The Court of Appeal unanimously affirmed on preemption grounds, without reaching the First Amendment issue. Pet. App. 32a, 76a.[3]

4. The California Supreme Court unanimously affirmed, holding that Petitioners' effort "to regulate cigarette advertising on the ground that it targets minors and encourages them to begin smoking" was preempted by FCLAA under this Court's analysis in *Lorillard*. Pet. App. 28a.

The California Supreme Court acknowledged that in *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th

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[3] In the trial court, Petitioners also sought to raise a challenge to the marketing of "Lights" cigarettes, but they subsequently abandoned the claim on appeal, and the Court of Appeal expressly held that it had been waived. Pet. App. 34a-35a, n.5. Petitioners also argued in the Court of Appeal that Respondents had violated the UCL by falsely "*denying* they were targeting minors with their cigarette marketing strategies and denying cigarette smoking is addictive." Pet. App. 67a (emphasis added). The Court of Appeal, however, rejected these claims on state-law grounds, holding that Petitioners had waived some of these claims and had failed to support the remainder with admissible evidence. *Id.* at 67a-75a. Petitioners did not seek review of any of these rulings (including their waived Lights claim) in the California Supreme Court, *see* Respondents' Answer to Petition for Review in the Cal. S. Ct. at 24-26, and all such claims have been waived as a matter of state law. *See PLCM Group v. Drexler*, 22 Cal.4th 1084, 997 P.2d 511, 518 n.3 (2000). Accordingly, none of these claims is before this Court. *Adams v. Robertson*, 520 U.S. 83, 86-90 (1997).

1057, 875 P.2d 73 (1994), it had previously held that FCLAA did not preempt a similar youth advertising claim. Pet. App. 15a-17a. *Mangini* had held that the predicate for the claim (as in this case)—Penal Code § 308's prohibition on tobacco sales to minors—was not "based on smoking and health" because it was originally enacted out of concerns about "good morals" rather than health concerns. 875 P.2d at 81. In this case, however, the California Supreme Court concluded that *Mangini*'s analysis was no longer valid in light of *Lorillard*, which held, "in an opinion that is binding on this court, that concerns about youth smoking are inherently intertwined with, and cannot be validly distinguished from, concerns about smoking and health." Pet. App. 23a. In addition, the California Supreme Court held that the California Legislature's subsequent amendments to Penal Code § 308 had confirmed that the statute "is now unquestionably based in large part, if not entirely, on health concerns." *Id.*

The court noted that *Lorillard* had held that FCLAA would not preempt States from banning advertising that "constitutes an inchoate crime," but the court concluded that Petitioners' particular attempt to frame and support such a theory failed. Pet. App. 24a-25a. In particular, the court held that the First Amendment precluded Petitioners' attempt to recast a broad range of Respondents' advertising as criminal aiding and abetting of illegal sales. *Id.* Applying the four-part test for commercial speech restrictions established in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the court held that the first three prongs "present no controversy here." Pet. App. 26a. However, Petitioners' theory failed on the fourth prong, because "treating [Respondents'] conduct in advertising their cigarettes

as aiding and abetting a violation of Penal Code section 308" was not reasonably tailored to the State's goals: "California has, and has employed, many other means of carrying out its policy of discouraging minors from smoking." *Id.* at 27a.

REASONS FOR DENYING THE PETITION

Petitioners seek review of an issue of federal preemption that this Court definitively addressed and resolved scarcely seven years ago in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), namely that a state-law claim based on concerns about "minors and cigarette advertising" is "based on smoking and health" under FCLAA. *Id.* at 550-51. In the proceedings below, the California Supreme Court expressly and properly overruled a contrary pre-*Lorillard* decision of that court, and its decision here does not conflict with any other appellate decision rendered since *Lorillard*. Beyond that, the California Supreme Court's decision merely applies the principles established in *Lorillard* to the particular facts of this case. In short, there is no split of authority on the preemption question presented, and the decision below largely involves a factbound—and correct—application of settled law to this specific factual record. The preemption issue raised in the Petition plainly does not merit review. *See post*, pp. 9-20.

Petitioners also seek review of the California Supreme Court's determination that the First Amendment does not permit Petitioners broadly to recast positive-image advertising of cigarettes as criminal aiding and abetting of illegal sales to minors. This question likewise does not warrant this Court's review. All parties agree that the First Amendment analysis here is governed by the four-part test established in *Central Hudson Gas & Elec.*

Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), and that was the test applied by the lower court. Pet. App. 25a-28a. In effect, Petitioners ask this Court to review the California Supreme Court's application of the *Central Hudson* test to the particular facts of this case, as presented on summary judgment. That question is not remotely certworthy. In any event, the lower court's First Amendment holding was unassailably correct in light of Petitioners' failures of proof, the gross overbreadth of their claims, and the availability and effectiveness of non-speech alternatives. *See post*, pp. 20-23.

The Petition should be denied.

I. The California Supreme Court's Preemption Holding Does Not Raise Any Conflict and Simply Applies This Court's Controlling Decision in *Lorillard* to the Specific Facts of This Case

In *Lorillard,* this Court resolved a then-existing split of authority among the lower courts (including the California Supreme Court) and held that state-law regulation of cigarette advertising based on "the specific concern about *minors* and cigarette advertising" is "based on smoking and health" within the meaning of FCLAA and therefore preempted. 533 U.S. at 550-51 (emphasis added). In the decision below, the California Supreme Court unanimously followed and applied *Lorillard* and accordingly overruled its contrary pre-*Lorillard* decision in *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 875 P.2d 73 (1994). *See* Pet. App. 28a. The California Supreme Court's application of the controlling decision in *Lorillard* to the facts of this case does not raise any issue warranting this Court's review.

A. *Lorillard* Settled the Preemption Question Presented Here

Section 5(b) of FCLAA expressly preempts any state-law "requirement or prohibition *based on smoking and health* ... with respect to the advertising or promotion of any cigarettes ...." 15 U.S.C. § 1334(b) (emphasis added). In *Lorillard*, this Court addressed the extent to which this provision precludes state-imposed "requirement[s] or prohibition[s]" based on concerns that exposure to cigarette advertising induces minors to smoke. 533 U.S. at 540. After reviewing the significant changes that had been made to FCLAA by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (the 1969 Act), the Court held that Congress in the 1969 Act had "sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising" and that, in pursuit of that goal, "Congress banned electronic media advertising of cigarettes." 533 U.S. at 548. At the same time, "to the extent that Congress contemplated additional targeted regulation of cigarette advertising, *it vested that authority in the FTC.*" *Id.* (emphasis added). The 1969 Act accomplished this latter objective by "expand[ing] the pre-emption provision with respect to the States, and at the same time, ... allow[ing] the FTC to regulate cigarette advertising." *Id.* at 545-46.[4]

Accordingly, *Lorillard* rejected a *Mangini*-style distinction between "the state's protective role" concerning minors and cigarettes, *Mangini*, 875 P.2d at 81, and the concern about smoking and health:

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[4] Prior to the 1969 Act, the scope of the preemption provision was more narrowly drawn, but it extended to both regulation by the States *and* regulation by federal agencies. *Lorillard*, 533 U.S. at 543-44.

> "[W]e fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health and cigarette advertising especially in light of the fact that Congress crafted a legislative solution for those very concerns."

533 U.S. at 550-51. "At bottom," this Court explained, "the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." *Id.* at 548.

The California Supreme Court in this case reached the wholly unremarkable conclusion that, in construing FCLAA's "based on smoking and health" clause, it was obliged to follow this Court's decision in *Lorillard*, notwithstanding *Mangini*'s earlier contrary conclusions. Pet. App. 3a, 23a, 28a. Thus, the court below correctly observed that, while *Mangini* had drawn a distinction between "concerns about youth smoking" and "concerns about smoking and health," *Lorillard* rejected that very distinction and instead held that the two were "inherently intertwined." *Id.* at 22a-23a (citing *Lorillard*, 533 U.S. at 548). The California Supreme Court therefore held that, to the extent *Mangini* concluded otherwise, it "has been superseded by the high court's later decision in *Lorillard*, and *Mangini* is therefore overruled." *Id.* at 28a.

This Court's decision in *Lorillard* thus definitively settled the applicable legal standard, and the California Supreme Court properly conformed to that controlling standard in resolving this case. In view of the resulting uniformity on the underlying question presented, this Court's review is unnecessary.

B. The Opinion Below Does Not Conflict with Any Decision of this Court or of Any Other Appellate Court

Petitioners' strained efforts to conjure a conflict of authority are demonstrably wrong and ignore the record in this case.

Petitioners incorrectly contend that the California Supreme Court's decision in this case conflicts with the plurality opinion in *Cipollone*. Petitioners argue that, because this case "involve[s] enforcement of general legal principles of tort or unfair competition law," the state high court should have concluded that the "predicate duty" underlying their UCL claim was a generally applicable one that was not based on smoking and health. Pet. 17. This erroneous argument raises no certworthy issue.

Petitioners are simply wrong in contending that this case raises *any* issue about how FCLAA preemption applies in the context of a generally applicable statute. Pet. 18-19. Petitioners' argument overlooks the fact that the California Supreme Court expressly held that Petitioners' claim here "is based on *two* laws," namely, "Penal Code section 308" (which prohibits the sale of tobacco to minors) and "the state unfair competition law" (which generally prohibits unlawful and unfair business practices). Pet. App. 28a (emphasis added).[5] Because Petitioners' claim

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[5] *See also* Pet. App. 22a ("Here, ... as in *Mangini*, plaintiffs' claim is based not only on the state unfair competition law *but also on Penal Code section 308*, which prohibits sales of tobacco products to minors and possession of tobacco products by minors.") (emphasis added). Indeed, Petitioners themselves acknowledge that their UCL claim rests critically on Penal Code § 308. *See, e.g.*, Pet. 9 ("[P]etitioners maintain that these actions constituted 'unlawful, unfair, or fraudulent' business practices under the UCL, because they encouraged violations of

thus rests critically on the tobacco-specific provisions of § 308, that claim—as a matter of state law—is *not* a generally applicable one, but is rather, a tobacco-specific one. Accordingly, as the case comes to this Court, it presents no question whatsoever about the application of FCLAA in the context of a generally applicable state law, and all of the Petition's verbiage on that subject is simply beside the point. Moreover, the California Supreme Court's state-law determination that Petitioners' claim is tobacco-specific is concededly fatal to Petitioners' entire argument: even Petitioners concede that a "tobacco-specific prohibition" on advertising is "based on smoking and health" under *Lorillard* and therefore preempted. Pet. 17; *see also Lorillard*, 533 U.S. at 549-50.

In any event, Petitioner's argument that the decision below conflicts with the plurality opinion in *Cipollone* is flatly wrong. Nothing in *Cipollone* even remotely suggests that, in determining what is "the legal duty that is the predicate" of a state-law claim, 505 U.S. at 524 (plurality), courts should ignore the *predicate statutes* (such as Penal Code § 308 here) on which the claim is based. And while Petitioners insist that their claim rests on a broadly defined duty prohibiting "business practices that encourage and profit from the violation of California laws and public policy," Pet. 15-16, the *Cipollone* plurality expressly rejected the view that the predicate legal duty of a state-law claim should be analyzed "at the highest level of generality." 505 U.S. at 530 n.27. Such an approach "would render the 1969 amendments almost meaningless and would pay too little respect to Congress' substantial reworking of the Act." *Id.*;

Penal Code section 308."); *id.* at 29 (acknowledging that "the law prohibiting the proposed transaction [here] is Section 308").

see also id. at 553-54 (opin. of Scalia, J.).[6]

Petitioners are also wrong in contending (Pet. 19) that the California Supreme Court's decision is "incompatible" with the analysis of the First Circuit in *Good v. Altria Group, Inc.*, 501 F.3d 29 (1st Cir. 2007), a case in which this Court recently granted certiorari. *See* 76 U.S.L.W. 3240 (Jan. 18, 2008). The very narrow FCLAA preemption issue presented on the unique record of this case is entirely distinct from the issues presented in *Good*. As explained earlier, the *sole* remaining state-law claim in this case is a claim that Respondents' advertising targeted youth, *see ante*, p.6, n.3, and that issue is squarely governed by this Court's decision in *Lorillard*—a fact that even the First Circuit itself recognized in *Good*. *See* 501 F.3d at 39 n.13 (discussing the California Supreme Court's opinion and agreeing that the result was "ordained" by *Lorillard*).

By contrast, *Good* arises in the context of a circuit split concerning whether certain false advertising claims are preempted by FCLAA under the approach articulated by the *Cipollone* plurality or otherwise. *Compare Good*, 501 F.3d at 41, *with Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th

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[6] Petitioners' contention that the decision below conflicts with this Court's decision in *Bates v. Dow Agrosciences*, Pet. 20, is frivolous. In holding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not preempt state-law claims that impose requirements that parallel federal law, the Court relied on the "rather obvious textual differences" between the FCLAA and FIFRA preemption provisions, specifically noting that *"[u]nlike the pre-emption clause at issue in Cipollone,"* FIFRA "prohibits only state-law labeling and packaging requirements that are 'in addition to or different from' the labeling and packaging requirements under FIFRA." *Bates*, 544 U.S. at 446-47 (quoting 7 U.S.C. § 136v(b)) (emphasis added).

Cir. 2007). That conflict is simply not implicated by this case, which (as it comes to this Court) does *not* concern alleged false advertising—all such claims here have been waived as a matter of *state law*. *See ante*, p.6, n.3. And, as set forth above, any broader question concerning the applicability of the *Cipollone* plurality framework is likewise irrelevant to this case, which involves a tobacco-specific state-law claim that is governed by *Lorillard*. *See ante*, pp. 10-13.

Because the legal issues and factual context of *Good* are entirely distinct from this case, and because (as explained below) the judgment in this case also independently rests on First Amendment grounds, *see post*, pp. 20-23, the Petition here should not be held pending this Court's disposition of *Good*.

C. Because the California Supreme Court's Decision to Overrule *Mangini* Also Rested on Changes in State Law, this Case Presents a Poor Vehicle for Reviewing Any Preemption Issue

As the California Supreme Court explained, Petitioners' theory was that Respondents' advertising violates the UCL *because* it allegedly "encouraged or induced violation of Penal Code section 308." Pet. App. 5a. Contrary to its earlier holding in *Mangini*, the court below held that this latter statute, which "prohibits sales of tobacco products to minors and possession of tobacco products by minors," is "based on smoking and health." *Id.* at 22a-23a. In overruling *Mangini* on this point, the court rested on two separate grounds. First, the court followed this Court's subsequent and "binding" decision in *Lorillard*, which held that, as a matter of federal law, the concern about youth and smoking is inherently

"based on smoking and health." *Id.* at 23a-24a. Second, the California Supreme Court concluded that, even apart from this Court's decision in *Lorillard*, "the legislative history of recent amendments to [Penal Code § 308] shows that *it is now unquestionably based in large part, if not entirely, on health concerns.*" *Id.* at 23a (emphasis added).

The California Supreme Court's alternative reliance on a revised construction of state law weighs strongly against this Court's review. As this case comes to this Court, the court below has definitively construed the state-law claim in question as resting on a tobacco-specific statute that, in its current form, was concededly *motivated* by concerns about smoking and health. As a result, this case would be an exceptionally poor vehicle for analyzing any federal preemption issue, because with these findings, the claim here would be preempted under any conceivable interpretation of the phrase "based on smoking and health."[7]

Petitioners nonetheless suggest tha' the California Supreme Court should have held that Penal Code § 308 was not based on smoking and health because it is *also* based on concerns other than smoking and health. Pet. 26; *see also* Brief of *Amici Curiae* 17. Petitioners cite no preemption cases that would support such a view, which is in any event squarely contrary to settled law. *See, e.g., Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 106 (1992) ("Our precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act preemption

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[7] This fact provides yet another reason why this case should not be held pending *Good*. *See ante*, pp. 14-15.

simply because the regulation serves several objectives rather than one.").[8]

D. The Opinion Below Does Not Give Respondents a "License" to Engage in Youth Marketing

Petitioners' suggestion that the opinion below grants an "unqualified license" to market cigarettes to minors (Pet. 39) is absurd. As an initial matter, each of the Respondents is a signatory to the Master Settlement Agreement (MSA) with the various States. *Lorillard*, 533 U.S. at 533. As the California Supreme Court expressly noted, the MSA bars Respondents "from '[t]aking any action, directly or indirectly, to target' minors in their advertising, promotion, or marketing of tobacco products." Pet. App. 3a-4a. Indeed, this youth-targeting prohibition of the MSA has been broadly construed and applied by the very same California courts that rejected Petitioners' claims here. *See, e.g., People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253, 11 Cal. Rptr. 3d 317, 345-47 (2004). Also, the FTC has specifically exercised its jurisdiction to challenge advertising that it believed targeted minors. 15 U.S.C. § 1336; *see also In re: R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999) (detailing the FTC's enforcement action challenging the "Joe Camel" ad campaign, and

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[8] Petitioners remark in passing that *Lorillard*'s approach to preemption is "somewhat unusual[]," because it "attached significance to a state's *motive*." Pet. 13 (emphasis added). But there is nothing unusual about a federal statute in which "'part of the pre-empted field is defined by reference to the purpose of the state law in question,' and 'another part is defined by the state law's actual effect.'" *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (Energy Reorganization Act); *see also Gade*, 505 U.S. at 105 (same as to Occupational Health & Safety Act).

concluding that the matter was mooted by the MSA's prohibition on cartoon characters).

Even apart from these potent restraints against youth marketing, the decision below makes clear that Respondents do not have *carte blanche* to market cigarettes to minors. On the contrary, the California Supreme Court faithfully followed *Lorillard*'s holding that FCLAA "still leaves significant power in the hands of States to impose generally applicable zoning regulations and *to regulate conduct*." 533 U.S. at 551 (emphasis added). *See* Pet. App. 19a-20a, 24a-25a. Drawing upon First Amendment cases recognizing that speech proposing an illegal transaction is *wholly unprotected* and may be regulated as conduct rather than speech, *Lorillard* held that the State's non-preempted power to ban *sales* to minors necessarily included the power to "prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." 533 U.S. at 552 (citing cases).[9] Here, the California Supreme Court expressly acknowledged these important limitations on the scope of preemption. Pet. App. 24a. The court found, however, that Petitioners' particular effort to assert such a non-preempted claim was factually unsupported and was too broad and unfocused to comport with settled First Amendment standards. *Id.* at 24a-28a. As explained below, that factbound holding does not merit this Court's review. *See post*, pp. 20-23.

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[9] Because *Lorillard* expressly confirms that FCLAA preemption only reaches state-law requirements or prohibitions "with respect to the *advertising or promotion*" of cigarettes, and not sales *simpliciter*, *amici*'s contention that the decision below somehow threatens the enforceability of prohibitions against sales to minors, *see* Brief of *Amici Curiae* at 8-9, 20-21, is flatly incorrect.

Petitioners contend that the California Supreme Court took too narrow a view of *Lorillard*'s description of what FCLAA did not preempt, Pet. 23-25, but once again this argument raises an issue that is factbound, involves no split, and was correctly resolved below. Where, as here, there is "no evidence of *any* tobacco advertisements that expressly or directly encourage the purchase of tobacco by minors," *In re Tobacco Cases II*, 2002 WL 31628649, at *7 (emphasis added), the lower courts properly rejected Petitioners' contention that their allegations of "intentional[]" targeting of youth were alone sufficient to evade FCLAA. Pet. App. 24a-25a (Supreme Court); *see also id.* at 59a (Court of Appeal) (same). As the court below correctly held, Petitioners' subjective-intent-defeats-preemption argument finds no support in *Lorillard* and would "severely undermine[]" the "purpose underlying FCLAA preemption." Pet. App. 24a. This case well illustrates the point: notwithstanding the Petition's repeated rhetoric about intentional targeting, Petitioners' actual theory below was that the requisite intent could be broadly inferred if, for example, Respondents "knew to a substantial certainty" that their advertising would reach minors to the same extent it would reach adults. *See* Appellants' Opening Brief in the Cal. Supreme Ct. at 34 (emphasis omitted); *see also* Respondents' Answering Brief in the Cal. Supreme Ct. at 24. The California Supreme Court correctly recognized that Petitioners' malleable theory of subjective intent would effectively gut FCLAA's preemption provision. Pet. App. 24a-25a.[10] In any event, this case-specific determination

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[10] Indeed, because Petitioners' claims below were focused on *magazine* advertising, they struck at the core of the area that Congress had sought to preempt from State-by-State regulation. *See Lorillard*, 533 U.S. at 593 (Stevens, J., concurring in part

does not raise any split of authority that would merit this Court's attention.

II. The California Supreme Court's First Amendment Holding Correctly Applies Well-Settled Law to the Facts of this Case

Petitioners' First Amendment question likewise raises no issue meriting this Court's review. In the proceedings below, the parties agreed that the First Amendment issues were governed by *Central Hudson*'s four-part test, and that is the same test that the California Supreme Court applied in assessing the viability of Petitioners' effort to treat Respondents' commercial advertising as "the aiding and abetting of a criminal offense." Pet. App. 27a-28a. Petitioners do not ask for this Court to reconsider any aspect of *Central Hudson*, and they do not identify any split of authority with respect to the lower court's resolution of the First Amendment issues. Instead, Petitioners merely challenge the California Supreme Court's application of two prongs of the *Central Hudson* test to this case. Pet. 29-39. That fact-specific argument manifestly does not merit review. In any event, the court below was correct in its unanimous holding that Petitioners' effort to recast Respondents' use of positive-image advertising as criminal aiding and abetting violated the First Amendment.[11]

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and dissenting in part) (noting that one of Congress's main concerns in FCLAA was that "given the nature of publishing, it might well have been the case that cigarette companies would not have been able to advertise in national publications without violating the laws of some jurisdictions").

[11] Petitioners vaguely fault the California Supreme Court for limiting its focus to criminal aiding and abetting. Pet. 25. That focus, however, was simply a consequence of the particular theory that Petitioners chose to assert in an effort to fit within *Lorillard*'s express statement that "common inchoate offenses"

Petitioners argue that the California Supreme Court misapplied the first prong of *Central Hudson*, which asks whether the speech at issue "concern[s] lawful activity" and is not misleading. 447 U.S. at 566. However, Petitioners overlook this Court's explicit holding in *Lorillard* that "so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products." 533 U.S. at 571. Indeed, the courts consistently have held that advertising for products that are lawful only for adults are entitled to threshold First Amendment protection.[12] While speech that proposes an illegal transaction would not be protected under the first prong of *Central Hudson*, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985), the lower courts

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that attach to illegal sales to minors are not preempted, 533 U.S. at 552. *See* Pet. App. 25a (describing Petitioners' effort to articulate a non-preempted theory); *id.* at 52a (Court of Appeal opinion) (same); *id.* at 96a (trial court opinion) (same). That Petitioners now regret their particular choice of theory, and wish they had pressed a different argument below, provides no basis to fault the California Supreme Court's analysis or to merit this Court's review.

[12] *See, e.g., Greater New Orleans Broadcasting Assn. v. United States*, 527 U.S. 173, 184 (1999) (gambling advertisements satisfied "the first part of the *Central Hudson* test" because "[t]heir content is not misleading and concerns lawful activities, *i.e.*, private casino gambling in Louisiana and Mississippi"); *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) (alcohol advertising is entitled to threshold protection even though "it might stimulate the thirst of a consumer to the point where he [or she] elects to violate" laws declaring some countries "dry"); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 421 (D. Vt. 1998) (tobacco advertisements were constitutionally protected because they "attempt[ed] to appeal indiscriminately to any individual who views them; there is no contention here that the advertisements, whatever the marketing strategy behind them, say 'Kids, get your Camels here'").

here found that *Petitioners presented no evidence of any cigarette ads that proposed an illegal sale to minors*. *See ante*, p.19.

Nothing in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), even remotely casts doubt on the California Supreme Court's determination that Respondents' advertising is entitled to threshold First Amendment protection under the first prong of *Central Hudson*. Pet. 33-34. *Grokster* did not address the First Amendment at all, but merely held that a party could be liable for copyright infringement for allegedly distributing software with the intent to induce a third party to commit infringement. 545 U.S. at 918-19.

If anything, Petitioners' reliance on *Grokster*'s discussion of the *substantive* law of contributory copyright infringement points to yet another deficiency in their claims in this case. Here, the governing substantive law underlying Petitioners' claim is not the federal law of copyright, but California law of aiding and abetting. Although the California Supreme Court found it unnecessary to reach the point, the other courts below held that Petitioners' aiding and abetting theory failed to satisfy the elements of such a claim *as a matter of California law*. *See, e.g.*, Pet. App. 53a-54a (Petitioners failed to show Respondents "directly aid[ed] or encourage[d] *an identifiable perpetrator*," as required by California law) (emphasis added); *id.* at 96a-102a (same). That the California Supreme Court's rejection of Petitioners' aiding and abetting theory may readily be sustained on alternative state-law grounds provides an additional powerful point against review here.

Petitioners' remaining argument—that the California Supreme Court misapplied *Central Hudson*'s tailoring prong—is equally unsuited for review.

Notably, in the appellate courts below, Petitioners never argued that they could satisfy this narrow tailoring requirement; on the contrary, they rested *entirely* on the argument that Respondents' advertising was not even entitled to threshold First Amendment protection. *See* Respondents' Answering Brief in the Cal. S. Ct. at 47.

In any event, the tailoring argument that Petitioners make for the first time in this Court is patently meritless. As the trial court noted, Petitioners' UCL theory was "virtually limitless" in its breadth and effectively sought to proscribe all positive-image advertising for the cigarette brands in question. *In re Tobacco Cases II*, 2002 WL 31628649, at *8. Petitioners candidly sought to attach liability to all "use of advertisements containing content, themes and/or imagery which gives children under the age of 18 a false positive impression of smoking." *See* Respondents' Supp. Appendix in Cal. Ct. of App. at 820. Petitioners submitted a chart listing literally hundreds of ads that they contended violated the UCL, *id.* at 1220-82, including an ad showing nothing more than open countryside. Viewed against the backdrop of Petitioners' grossly overbroad theory, the California Supreme Court's observation that that theory overlooked the availability of non-speech alternatives is unassailable. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002) (a regulation fails "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech"); *see also Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (Alito, J.) (invalidating ban on alcohol advertising in university newspaper; the State "can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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86

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IN THE
Supreme Court of the United States

DEVIN DANIELS, BRYCE CLEMENTS, DAIMON FULLERTON, NICOLE MURROW, AND MAREN SANDLER, CLASS REPRESENTATIVES,

Petitioners,

v.

PHILIP MORRIS USA, INC., R.J. REYNOLDS TOBACCO CO., LORILLARD TOBACCO CO., AND BROWN & WILLIAMSON TOBACCO CORP.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 6

Cipollone v. Liggett Group Inc.,
505 U.S. 504 (1992) ..... passim

Good v. Altria Group, Inc., 501 F.3d 29
(1st Cir. 2007) 7

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) ..... passim

Mangini v. R.J. Reynolds Tobacco Co.,
7 Cal.4th 1057 (1994) 3,4,7

Metro-Goldwyn-Mayer Studios Inc. v.
Grokster, Ltd., 545 U.S. 913 (2005) 10,11

Pittsburgh Press Co. v. Pittsburgh Comm'n on
Human Relations, 413 U.S. 376 (1973) 10

Rowe. v. *New Hampshire Motor Transp.*
Ass'n, No. 06-457, Slip. Op. (Feb. 20, 2008) 5

Stop Youth Addiction, Inc. v.
Lucky Stores, *Inc.*, 17 Cal. 4th 553,
950 P.2d 1096, 1094 (1998). 5

United States v. Philip Morris, 449 F. Supp. 2d 1 (D.D.C. 2006) 6

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 10

Statutes:

Cal. Pen. Code, Section 308 ..... passim

Other Materials:

S. Rep. No. 91-566 (1969) 5

The California Supreme Court held, as a matter of both (1) federal statute and (2) constitutional right, that companies in the business of marketing cigarettes are entitled to an exemption from the generally applicable state-law duty to refrain from encouraging (and profiting from) unlawful business transactions. These extraordinary rulings assuredly are not, as respondents claim, "factbound" (Opp. 1) applications of any decision of this Court. On the contrary, as our petition showed, the court below fundamentally misread *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), as having effectively overruled *Cipollone* v. *Liggett Group Inc.*, 505 U.S. 504 (1992); it ignored *Lorillard*'s clear indications that State laws prohibiting the encouragement of unlawful behavior are, for obvious reasons, beyond the reach of the statutory preemption clause; and it took a view of the First Amendment at odds with decades of precedent.

Respondents' Brief in Opposition repeats and magnifies these errors, and fails to refute our demonstration that, given the importance of the social problem and state prerogatives at issue, this Court's review is warranted.

1. Respondents' central thesis is that the question presented here was "resolved" in *Lorillard*. Opp. 1, 8-11. That is manifestly untrue.

First, *Lorillard*, unlike *Cipollone* and this case, did not involve a particular application of a general state law duty, unrelated to tobacco. The duty the Massachusetts Attorney General sought to enforce was to refrain from advertising *cigarettes* in specified areas. The duty here is to refrain from unfair modes of business competition, including (but not limited to)

purposefully encouraging and profiting from unlawful commercial transactions. Thus, while *Lorillard* confirmed States' power to apply genereal laws to tobacco advertising, see 533 U.S. at 551, the result of the preemption decision below is that California may impose civil UCL liability for businesses that seek commercial advantage by promoting violations of laws relating to pornography, alcohol, gambling, copyrights, drug paraphernalia – but not those relating to cigarettes.

Second, the regulations held preempted in *Lorillard* were not limited to and arguably did not reach advertising targeted at minors. The regulations flatly proscribed advertising over a large percentage of the State and applied fully to advertising explicitly intended to communicate truthful information to adult smokers. See 533 U.S. at 573 (Thomas, J., concurring in part and concurring in the judgment) (noting that ban "cover[ed] as much as 90 percent of the three largest cities in Massachusetts," and was not limited to advertising containing "youthful imagery").[1]

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[1] The regulations in *Lorillard* were promulgated *after* Massachusetts and the tobacco companies had agreed to a MSA, which obliged the companies to refrain from targeted advertising. Thus, whereas that case dealt with advertising that was not targeted to youth – and involved a complete ban – this one involves only activities that *were* targeted to youth and concerns imposition of civil liability for those unlawful transactions only.

Although respondents now suggest (Opp. 9) that certiorari was granted in *Lorillard* to review decisions like *Mangini* v. *R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 875 P.2d 73 (1994), affirming States' power to impose liability for targeted advertising, certiorari was denied in *Mangini* itself, 513 U.S. 1016 (1994); the tobacco companies' merits briefs in *Lorillard* did not mention the decision; and the companies (represented by the counsel of record for respondents in this case) assured the Court that holding the *Massachusetts* regulations preempted would not require the Court to cast doubt on States' power to regulate (or prohibit) youth-targeted advertising and promotions. See Br. of Petitioners, No. 00-596 at 35-36 (stressing that Massachusetts regulations did not address advertising "targeted to children," but instead took a "blunderbuss approach").

Lorillard did not hold or even suggest that States were disabled from regulating, by criminal or civil laws, commercial behavior specifically intended (as was respondents' here) to induce young people to unlawfully purchase and smoke cigarettes. Rather, as explained in the petition, the *Lorillard* Court, consistent with these industry assurances, strongly indicated that State powers to deal with such activities were beyond the reach of the FCLAA preemption clause. 533 U.S. at 552.

Respondents (Opp. 18) endorse the California court's illogical understanding of the "exception" acknowledged in *Lorillard*, *i.e.*, that States have

power only to enforce criminal laws prohibiting promotion of cigarettes to minors, but not civil liability regimes. As we showed, (Pet. 24-25) this reading is contrary to the very First Amendment precedents from which the relevant part of the *Lorillard* opinion explicitly borrowed: indeed, it is blackletter First Amendment law that regulation is a less restrictive alternative than an outright ban – and civil liability raises less concern than criminal punishment.

2. Because this case is not controlled by *Lorillard*, respondents' preemption defense should have been analyzed – and rejected -- under *Cipollone*. The theory of preemption embraced by respondents (and the court below) is irreconcilable with the *holding* of *Cipollone* – *e.g.*, that state law fraud claims were *not* preempted – and it is telling that respondents, citing a *Cipollone* footnote, 505 U.S. at 529 n. 27, for the proposition that the "predicate legal duty" test should not be decided at "too high a level of generality," neglect to note that the same footnote rejects Justice Scalia's approach (and respondents') as taking an impermissibly low- level view.

3. To create some distance from *Cipollone*, respondents (Opp. 15-17) distort *Mangini* and California law. Although *Mangini* contained dictum about Penal Code Section 308, its holding was that, for preemption purposes, the "predicate duty" underlying a claim like the one here "is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law." 875 P.2d at 80. Accordingly, the California Supreme Court's

Lorillard-influenced re-examination of Section 308 is largely beside the point.

Respondents' theory (Opp. 12-13), that the appropriate analysis would consider, not just the fair competition duty imposed by the UCL but also the "duty" under Penal Code Section 308, to not sell tobacco to minors ignores the text of the FCLAA. The statute preempts only state requirements and prohibitions "with respect to the advertising or promotion of any cigarettes," which Section 308's prohibitions plainly are not. Moreover, respondent's approach is inconsistent with California courts' characterization of UCL claims like this one as *not* "enforcing" the separate rule of state law, but resting instead upon an "independently actionable" obligation not to profit by promoting transactions violative of state law, *Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 17 Cal. 4th 553, 566, 950 P.2d 1096, 1094 (1998).

Cipollone also rested on the historic allocation of power between State and federal government and, ultimately, on congressional purpose. 505 U.S. at 528-29 & nn. 25, 27. The prohibition against encouraging youth smoking is much closer to core traditional police power than is general advertising regulation, and is, to say the least, well beyond the limits of what Congress expected would be preempted in 1969. See *Cipollone*, 505 U.S. at 529 n.25 (quoting S. Rep. No. 91-566 at 12 (1969)). Cf. *Rowe.* v. *New Hampshire Motor Transp. Ass'n*, No. 06-457, Slip. Op. at 1 (Feb. 20, 2008) ("[N]o comprehensive federal law currently exists to

prevent tobacco sellers from exploiting the underage market.") (Ginsburg, J., concurring).

Although Respondents refer derisively to "Petitioners' subjective-intent-defeats-preemption" theory, Opp. 19, it is their contrary "preemption-protects-purposeful-youth-targeting" theory that strains credulity. It is simply implausible that Congress – having been assured by the tobacco companies that they would not market to minors, see Pet. 27-29 -- intended to license cigarette companies to advertise directly to the youth markets, in violation of general state fair businesses competition laws. Enforcing such state laws does not implicate the purposes of FCLAA preemption, *i.e.*, protecting the flow of (lawful) commerce in cigarettes against conflicting and confusing regulations, *Lorillard,* 533 U.S. at 531 (citing 15 U.S.C. 1331): A federal regime that preserves' States' authority to control youth-targeted marketing would not affect companies' ability to advertise and sell cigarettes to adult smokers. Indeed, such regulation preserves the integrity of the national market by preventing firms from gaining a competitive advantage by promoting illicit sales and use of cigarettes.[2]

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[2] As our petition noted, the consonance of California's UCL with the FTC's consumer protection policies (on which the UCL was based) is a reason for upholding, not preempting, petitioners' state cause of action. See Pet. 5-6, 20-22 (discussing *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005). See also *United States* v. *Philip Morris, Inc.*, 363 F. Supp. 2d 72, 80 (D.C. 2003) ("*Cipollone* necessarily rejected the

4. Respondents consistently mischaracterize the UCL claim here and the evidence supporting it. Attempting to shoe-horn this case into the *Lorillard* mold, they claim that petitioners sought to predicate liability on the mere fact that adolescents were *exposed* to respondents' cigarette advertisements. (Opp. 19). But that misrepresents the record. The courts below were presented with ample evidence that respondents' development marketing plans with the specific purpose of inducing minors to purchase and smoke their cigarettes, thereby creating new generations of addicted, brand-loyal customers. See Pet. 9-10. The decision of the California court was not, as respondents claim (Opp. 19), based upon any determination that petitioners' evidence of targeting was *inadequate*; instead, the court below – after having affirmed in *Mangini* that the FCLAA does not preempt a UCL targeting claim – concluded (erroneously) that *Lorillard* had rendered such a claim categorically preempted.[3]

Defendant's arguments that the FTC has exclusive authority over all tobacco advertising, marketing, promotion, and warning claims.").

[3] On January 18, 2008, this Court granted certiorari in *Altria Group, Inc.* v. *Good*, 07-562, to review a First Circuit decision, 501 F.3d 29 (1st Cir. 2007), that upheld a claim under the Maine Unfair Trade Practices Act against a FCLAA preemption defense. This Court in *Good* will address for the first time the impact of the FCLAA – and *Cipollone* and *Lorillard* – on private claims arising under state unfair competition laws. Given the substantial overlap of

5. The decision below further held that, statutory preemption aside, respondents enjoy a *First Amendment right* to direct cigarette advertising to California youth, with the specific purpose of encouraging them to purchase and smoke cigarettes, in violation of State law and that, under this Court's commercial speech doctrine, California may address youth smoking only by prosecuting "direct sellers" and teenagers, leaving manufacturers free to encourage (and derive competitive advantage from) unlawful sales.

a. Respondents protest that this does not amount to a "license," pointing to their obligation under the 1998 MSA to refrain from youth-targeted advertising and the FTC's enforcement action against their "Joe Camel" campaign, but that is precisely what the First Amendment ruling below confers. The FTC's authority, no less than the State's, is limited by the First Amendment – if a California suit claiming unfair trade practice is unconstitutional, so too is a federal suit (indeed, while respondents routinely deploy FTC and FCC regulation as a shield when State regulation is being challenged, they have taken care not to concede the constitutionality of these federal measures). And as respondents well know, the MSA imposed *no limit* whatsoever on the targeted advertising at issue here (or on the advertising of non-signatories); that respondents' (contractual) promise to refrain from youth targeting had to be purchased for valuable

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issues, see Pet. at 19, this petition should be held for *Good* if is not granted.

consideration (*i.e.*, dismissal of claims against them in the billions of dollars), is proof that respondents *do* indeed have a license.

2. As the petition showed, the First Amendment ruling below, far from a routine, fact-bound application of this Court's *Central Hudson* case law, represents a dramatic and consequential break with decades of commercial speech precedent.

In familiar fashion, respondents' answer begins (and largely ends) by directing the Court to *Lorillard*, insisting that that decision, in sustaining a First Amendment challenge to a tobacco advertising regulation, conferred a constitutional *carte blanche* to market cigarettes to minors. But here again, the *Lorillard* decision respondents brandish bears no resemblance to the one this Court handed down. To be sure, *Lorillard* observed that "'so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products.'" (Opp. at 21, quoting 533 U.S. at 571). But it did so in striking down a sweeping regulations that prohibited advertising specifically directed at adults. *Lorillard* did not hold that the industry has a "protected interest in communicating information about its products" *to youth* – let alone to encourage youth to purchase cigarettes, in violation of State law. On the contrary, the petitioners there labored to show that no such question was before the Court, see *supra*, – as it is in this case – and the Court's opinion pointedly equated youth-targeted advertising with speech relating to unlawful commercial transactions,

which enjoys no First Amendment protection. 533 U.S. at 552.

As the petition showed, the First Amendment rules adopted below – (1) that communications *intended* to encourage unlawful commercial transactions are constitutionally protected, so long as the audience might include someone for whom conduct was lawful and (2) that States may not hold those who encourage (and profit from) illegal activity civilly liable unless they are direct participants in illegal behavior – are in square conflict with this Court's decisions in *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 492 (1982), and *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005).

Respondents omit any discussion of the first two decisions and seek to wave *Grokster* aside, on the ground that it was a Copyright Act, rather than a "First Amendment," case. But this cannot do: under the decision below, the rule this Court announced in *Grokster* (itself grounded on decades of case law under the Patent Act) – *i.*e., that a company may be civilly liable for a third party's unlawful conduct based on its advertising encouraging such conduct – would be facially unconstitutional. Nor was the Court, as respondents imply, focused narrowly on statutory matters: no fewer than five amicus briefs in *Grokster* devoted substantial discussion to First Amendment arguments against (and in favor) of the rule the Court adopted.

Nor can respondents' claim that their conduct falls outside California's (criminal) law of aiding and abetting support the decision below. Petitioners are not seeking criminal punishment here – they are trying to impose civil liability on the same basis as the Copyright and Patent Acts do, and the court below interpreted the First Amendment as disabling Government (State or Federal) from doing so.

Unable to defend the decision the California Supreme Court issued, respondents advance an entirely different rationale – Petitioners' claims of intentional targeting were so "overbroad" (Opp. 23), they say, that the court below was entitled to throw the case out on First Amendment grounds. Unsurprisingly, respondents in advancing this argument do not present petitioners' claims and supporting evidence in an accurate light, let alone the one must favorable to the non-movants. Below, petitioners did not rest on respondents' advertisements, but adduced direct, inculpatory evidence of specific intent to induce unlawful purchases and smoking. See., *e.g.*, Pet. 9-10. But even if some of the advertisements challenged were entitled to constitutional protection, it would not follow that respondents could not be held liable for actions that *were* taken with the intent of inducing youth smoking, or that rejection of the whole suit was proper.

Finally, respondents (following the decision below) continue to place a thumb on the constitutional scale, by treating this case – which seeks only civil liability for actual unlawful sales that respondents encouraged and profited from -- *as*

if it concerned California's power to proscribe entirely particular advertisements or to criminally punish companies for advertising. Although some advertising might be so conscience-shocking that a State could ban it across-the-board ("kids: buy this month's *Hustler* magazine"; "use Grokster to circumvent copyright laws") or even impose criminal punishment, this case seeks only to hold defendants civilly liable for their role in unlawful transactions they directly encouraged and profited from.[4]

Respondents' effort to prop up the lower court's "narrow tailoring" analysis – or at least depict it as "fact-bound" – likewise cannot succeed. As the petition explained, the decision below – in pronouncing the UCL unconstitutional as unnecessary to accomplishment of the State's interest in discouraging youth smoking – committed two large errors of First Amendment law. The court simply ignored two *other* substantial governmental interests served by UCL liability (1) in regulating

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[4] Indeed, California's liability regime, if anything, under-deters: the evidence shows that respondents sought to induce 14 year olds to smoke their cigarette brands, not only to reap the profits from four additional years of sales, but to increase the likelihood that these individuals would be loyal (addicted) customers from age 18 onwards. Thus, it might still be in tobacco companies' economic interest to promote such behavior, even if they had to forfeit proceeds of the initial unlawful sales. But under the regime sanctioned here, matters are more stark: a company that shows respect for California's laws governing youth cigarette purchases would be at a grave competitive disadvantage vis-à-vis a competitor that advertises its brands to minors.

commercial behavior, so businesses that respect policy choices reflected in California law are not competitively disadvantaged for having done so; and (2) in expressing moral disapproval of those who encourage (and profit from) youth tobacco purchases. The State Supreme Court's conclusion, that patchwork of point-of-sale enforcement and antismoking education is sufficient to stem the tide of youth smoking (or that the 1998 MSA, which by its terms has no application to the conduct at issue here, should be factored into the narrow tailoring analysis) is empirically implausible and shows far less deference for the State's choice of means than this Court's precedents demand.[5]

[5] Given that extent to which Section 308 can be – and is – violated without an unlawful sale, *e.g.*, when a minor smokes cigarettes purchased by an 18-year-old, even 100% enforcement at the point of sale could not be sufficient to fully overcome the (intended) effects of respondents' advertising efforts.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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In The Supreme Court of the United States

DEVIN DANIELS, BRYCE CLEMENTS, DAIMON FULLERTON, NICOLE MURROW, AND MAREN SANDLER, CLASS REPRESENTATIVES,

Petitioners,

v.

PHILIP MORRIS INC., R.J. REYNOLDS TOBACCO CO., LORILLARD TOBACCO CO., AND BROWN & WILLIAMSON TOBACCO CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

I. Interest of *Amici Curiae* Center for Public Interest Law (CPIL) and Children's Advocacy Institute (CAI) 1

II. Summary of Argument 3

III. Commercial Speech Considerations in *Lorillard* (or Elsewhere) Do Not Preclude State Remedies for the Solicitation of Children into Tobacco Addiction..... 5

IV. The *Daniels* Decision Below Disrespects State Prerogative and Federalism Precedents 7

V. Review is Commended by the Importance of the Issue Presented, Its Reach, and Conflict Where this Court's Own Precedent is at Issue 18

Conclusion..... 24

TABLE OF AUTHORITIES

Page

CASES

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 5

Cipollone Leggett Group Inc., 505 U.S. 504 (1992) 7

Gonzales v. Raich, 545 U.S. 1 (2005) 22

Good v. Atria Group Home, Inc., 501 F.3d 29 (1st Cir. 2007) ..... *passim*

Holloway v. Bristol-Meyers Corporation, 485 F.2d 986 (D.C. Cir. 1973) 20

In Re Tobacco Cases II, 41 Cal. 4th 1257, 163 P.3d 106, 63 Cal. Rptr. 3d 418 (2007) ..... *passim*

Lorillard Tobacco Company v. Reilly, 533 U.S. 525 (2001) ..... *passim*

STATUTES

5 U.S.C. § 1331 11

15 U.S.C. § 45 19

15 U.S.C. § 1334(b) 7

California Business and Professions Code § 17200 *et seq.* 1

California Business and Professions Code §§ 17203-17206 20

California Business and Professions Code § 17206 20

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

National Institute on Drug Abuse, Art Card: Nicotine – An Addictive Drug – Addictive Drug (Inventory Number: NIDACRD11) 12

National Institute on Drug Abuse, Mind Over Matter: The Brain's Response to Nicotine (Inventory Number: PHD807) 12

National Institute on Drug Abuse (NIDA) Reports 11

National Institute on Drug Abuse, NIDA InfoFacts: Cigarettes and Other Nicotine Products (March 2004), FACT SHEET, Health Professionals; Parents/Caregivers; Prevention Program Planners; Students 12, 13

National Institute on Drug Abuse, NIDA InfoFacts: Cigarettes and Other Nicotine Products (March 2004) (Inventory Number: NIF010 1999 NIDA) 12

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National Institute on Drug Abuse, NIDA Research Report Series: Tobacco Addiction 13

TABLE OF AUTHORITIES – Continued

Page

National Institute on Drug Abuse, Addiction; NIDA Research Report Series: Tobacco Addiction; NIDA Research Report Series: Heroin Abuse and Addiction; NIDA Research 13

On the Measurement of Nicotine Dependence in Adolescence: Comparisons of the FTQ and a DSMIVBased Scale, Denise Kandel, Ph.D, Christine Schaffran, MA, Pamela Griesler, Ph.D, Jessica Samuolis, Ph.D, Mark Davies, MPH, and Rosaria Galanti, M.D., Ph.D, JOURNAL OF PEDIATRIC PSYCHOLOGY (June 2005) 30(4):pages 319-332, excerpted at http://whyquit.com/whyquit/LinksAAddiction.html 18

United States Convenience Store Association, statistics and sales data (http://npnweb.com/uploads/researchdata/2006/ConvenienceStoreData/0606_ccss.asp) 19

I. Interest of *Amici Curiae* Center for Public Interest Law (CPIL) and Children's Advocacy Institute (CAI)[1]

The Center for Public Interest Law (CPIL) is an academic center based at the University of San Diego (USD) School of Law. CPIL trains students in the practice of public interest law and operates a statewide law firm representing consumer interests before the regulatory agencies of California. The Children's Advocacy Institute (CAI) is a sister academic center at the USD School of Law focusing on the health and safety of California's children. The decision below implicates central concerns of both organizations.

CPIL has had a longstanding interest in the California Unfair Competition Law (UCL, at California Business and Professions Code § 17200 *et seq.*) here at issue: CPIL has trained students in its provisions since 1980. It has also been involved in the California Law Revision Commission's deliberations on reform of the statute in the late 1990s. It has filed suit under its terms as part of its public interest litigation.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record received timely notice of *amici* CPIL and CAI's intent to file this brief, and the parties have consented to the filing of this *amici curiae* brief. Their letters of consent have been filed with this Court under separate cover.

Pursuant to Rule 37.6, *amici* CPIL and CAI state that this brief was not written in whole or in part by counsel for a party, and no other individual or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

The instant case also affects child protection issues, since it would foreclose state consumer protection even where child health is implicated under a misplaced commercial speech rationale. Since 1990, the Children's Advocacy Institute has worked to protect child health and safety in California, sponsoring legislation and litigating over the last decade pertaining to health and safety across a spectrum of issues (from playground and swimming pool safety to the "Kids' Plates" custom license plate statute funding poison control centers and other child protection funds. CAI's formal course at the University of San Diego School of Law is *Child Rights and Remedies,* the text of which includes substantial coverage of the U.S. Supreme Court decision in *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001) here at issue. The California Supreme Court's interpretation of *Lorillard* to categorically bar application of state unfair competition law raises serious questions of law and policy central to the longstanding work of the Center for Public Interest Law. And because the decision below denies state remedy for inherently misleading and harmful advertising to children, is also important to CPIL's sister organization, the Children's Advocacy Institute. Accordingly, these two organizations, whose interests coalesce in the petition now before this Court, respectfully pray that their arguments in support of the grant of *writ of certiorari* be considered.

II. Summary of Argument

In the decision below (*In Re Tobacco Cases II*, 41 Cal. 4th 1257, 163 P.3d 106, 63 Cal. Rptr. 3d 418 (2007), hereinafter referred to as *Daniels*), the California Supreme Court dismissed a class action complaint alleging the deliberate targeting of children for the marketing and sale of cigarettes in violation of the state's Unfair Competition Law. The court's stated basis for its dismissal is this Court's holding in *Lorillard Tobacco Company v. Reilly,* 533 U.S. 525 (2001). Specifically, the court below held that the Federal Cigarette Labeling and Advertising Act concerning health and safety advertising preempts California's Unfair Competition Law because health and safety considerations underlie protection of sales to minors and hence, such marketing is subject to exclusive federal control under the statute. And the decision also holds that the advertising of tobacco is subject to commercial speech protection shielding it from the allegations.

Amici curiae CPIL and CAI contend that the commercial speech rights of tobacco outlined in *Lorillard* did not reach deceptive practices, nor sale to minor limitations. *Lorillard* rejects broad limitations on placement of accurate advertisements of a lawful product where those state restrictions are not narrowly tailored to a compelling state interest. The case turned on the lack of nexus between billboard and sign placement and child tobacco usage. The instant *Daniels* case alleges direct, successful marketing to children and addresses precise practices with the

intent and effect of accomplishing such sales (and addiction enhancement). The nexus as alleged is direct and is connected to an acknowledged compelling state interest, and to an unlawful business practice.

Amici contend that: (a) the rationale behind tobacco sale-to-children prohibition extends beyond the health and safety ambit of the Federal Labeling Act, and reflects a major public policy disfavoring purchases of an addictive product – separate and apart from health consequences; (b) the Federal Labeling Act's terms and legislative history extend only to health and safety representations, while the *Daniels* allegations go to the very different marketing practice of selling an addictive product to children – a practice properly subject to fair competition regulation with or without any health consequence; (c) the fact of cigarette health and safety problems does not moot or subtract from a host of other reasons to limit sales to minors; (d) the decision below transforms the deficit of health and safety threat into a perverse rationale for industry unfair competition immunity; (e) the rationale of the court would logically moot all sale-to-minor prohibitions as "at bottom" health and safety regulation cancelled by the Federal Labeling Act; and (f) the *Lorillard* decision did not mandate federal preemption of sale-to-minors (or addictive substance sale) state regulation.

Finally, CPIL and CAI argue that review of the decision below is commended by: (a) the importance of tobacco marketing of an addictive product and of

sales to minors – including the high national sales volume of the product and its addictive nature; (b) the national implications of mooting unfair competition statutes effective in all 50 states over a broad reach of tobacco industry marketing; (c) the removal of authority for unfair competition enforcement by both private and public (DAs, AG) actions; (d) the necessary implication underlying the decision below that preemption applies not only to marketing of health claims, but also to sales restrictions to minors; (e) the conflict between the First Circuit's *Good v. Atria Group Home, Inc.*, 501 F.3d 29 (1st Cir. 2007) decision allowing suit over "light" cigarette advertising (which *does* involve primarily health and safety representations) involved; and (f) the gross error of the decision below in its application of this Court's own *Lorillard* decision – warranting correction by the misinterpreted source.

III. Commercial Speech Considerations in *Lorillard* (or Elsewhere) Do Not Preclude State Remedies for the Solicitation of Children into Tobacco Addiction

The *Lorillard* decision of this Court acknowledged the commercial speech rights of the tobacco industry (or any other business engaged in the sale of a lawful product). But it also interposed the usual limitations on such advertising. Petitioners argue that the balancing test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) does not apply first amendment protection to

tobacco industry marketing to minors. But one does not have to look to any kind of refined balancing test to reach the conclusion of petitioners. As *Lorillard* itself emphasizes, commercial speech rights do not insulate untruthful ads from liability. Misleading ads are categorically without commercial speech protection. And beyond the truth requirement, the states may restrict such speech under a strict scrutiny analysis where there is a "compelling state interest." *Lorillard* recognizes that sales to minors are such a state interest. The primary objection to the Massachusetts restrictions struck in *Lorillard* involve the failure of the state to adequately tailor its prescriptive rules to that compelling interest. Hence, Justice O'Connor noted that prohibiting advertisements in stores below 5 or 6 feet from the ground would not be adequately connected to child protection. The Justice noted the lack of evidence that children see at their own level any more persuasively than they see a sign placed at a higher level. Although CPIL and CAI respectively contend that a proper factual predicate could and should have been produced to provide the needed nexus, the Court held that the record in the case was deficient in such a necessary showing. The judgement rested on the conclusion that evidence failed to establish such a connection – not that state regulation was categorically barred. Similarly, the Court found a lack of nexus between the ban on billboards in locations where more children may see them and the discouragement of child smoking. The restriction was overly broad and not sufficiently

tailored to the interest acknowledged by the Court to be qualifiedly compelling.

The *Daniels* class plaintiff is not purporting to impose categorical prophylactic restrictions on advertising. It is alleging a deliberate advertising campaign to target children. It is directed at the cessation of those specific practices. It must prove the connection to child marketing impact. It does not raise the questions that led to the reversal of the general and broadly applied restrictions struck in *Lorillard*.

IV. The *Daniels* Decision Below Disrespects State Prerogative and Federalism Precedents

The Federal Cigarette Labeling and Advertising Act (hereafter "Federal Labeling Act") provides that "no requirement or prohibition *based on smoking and health* shall be imposed under State law with respect to the advertising or promotion of any cigarettes the package of which are labeled in conformity with the provisions of this chapter" (emphasis added) 15 U.S.C. § 1334(b). The decision below seizes upon this instruction to bar state unfair competition limitation of tobacco advertising practices beyond health debilitation.

The brief of petitioners herein focuses on *Cipollone v. Leggett Group Inc.*, 505 U.S. 504 (1992), which held that the Federal Labeling Act does not preempt state unfair competition enforcement, and cites *Good v. Atria Group Home, Inc.*, 501 F.3d 29 (1st Cir. 2007) decision of the First Circuit which also found no

preemption. The petitioners argue that the "light" cigarette (allegedly safer) advertising of tobacco companies in *Good* was misleading and hence violative of the Maine unfair competition laws there at issue. The point made is that a federal health and safety directive does not extend to affirmatively misleading advertising (petitioners' brief at 18-22).

Petitioners also argue that the Federal Labeling Act expressly left FTC jurisdiction over deceptive ads intact and that, because state unfair competition statutes are "parallel" to that FTC jurisdiction, they are not pre-empted.

The argument of petitioners has merit, but it seriously understates the error of the California Supreme Court in the decision below, which relies largely on *Lorillard's* line:

> "At bottom, that concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected" (*Lorillard*, 533 U.S. 525 at 548, quoted in *Daniels*, 41 Cal.4th 1257 at 1270 to 1272).

But the *Daniels* decision fails to acknowledge that the *Lorillard* holding *en toto* hardly challenged the authority of the states to regulate tobacco sales to minors. Retailers cannot sell to youth under 18 years of age in any of the several states under statutes enacted in all of them. Presumably, the Federal

Labeling Act does not preclude unfair competition enforcement to limit sales to minors. One dilemma posed by the *Daniels* court is: How can the statute bar a deliberate marketing campaign to target minors for sale of an addictive product.... presumably because that effort is "at bottom" driven by health and safety concern (as *Daniels* concludes), and by the same line of logic not also bar the more categorical state restrictions on child sales? If the specific effort to solicit children – precisely proven and with specific rifle-shot remedies proposed to stop must fall to a distantly related federal statute commanding package warnings about health, than the general prophylactic prohibition by an age category – also based on the very same stated health and safety concerns – would appear to be exempt *a fortiori*. What is the point of distinction here that cuts in favor of upholding a gross limitation on sales to 17 year olds buttressed by criminal sanctions as within the state ken, while applying federal exclusive prerogative to bar enforcement of fair competition standards applied to a specific set of tactics that are intended and effectuate addictive sales to minors ? It is the same population, addressed for the same public policy rationale. Respondents are properly asked where the line is drawn to maintain any state limitation on underage smoking sales under the *Daniels* logic and holding below.

At least in *Good*, tobacco could argue that the light cigarette ads challenged by plaintiffs really pertained to health and safety claims and that the

underlying issue was whether light cigarettes are more or less hazardous. The First Circuit in *Good* upheld the parallel jurisdiction of Maine's unfair competition law. But here the case is easier for petitioners and much more attenuated for tobacco. Here we are talking not about health and safety advertising at all – but about the sale of an *addictive* product to minors. Imagine, *arguendo*, that a small rogue tobacco firm based in El Centro, California, injects its cigarettes with amphetamine derivative for strong addictive effect, and then sweetens the tobacco and filter tips – deliberately to appeal to teen consumers. And imagine that it is a relatively safe cigarette, sans tar and other carcinogens. The purpose of the rogue marketing scheme is to create a customer base who become addicted to their product, marketed to them as teens and with the addictive effect unmentioned in ads or marketing. But the *Daniels* holding applies the labeling and advertising provision quoted above as the source of federal immunity to bar a state from stopping or interfering with such marketing. Nor is the El Centro rogue addiction-hyping-youth-marketing hypothetical irrelevant – it is essentially what the class in *Daniels* contends the respondents have done with their more dangerous product composition.

The legislative history of the Federal Labeling Act is not mysterious. The Congress found that the emphysema, respiratory, carcinogenic and other health effects of its product properly trigger a specified package ad "warning" message as to health

effects. And the statute prohibited television promotion of the product given its health impact. Nothing in that statute or its history has anything to do with other – non-safety – business practices of tobacco. (*See* Congressional findings and intent stated at 15 U.S.C. § 1331 for the underlying findings and intent of the Congress in the Federal Labeling Act Enactment). If tobacco companies fail to pay taxes as required by state law, or defraud consumers, or bait and switch as to pricing, or charge usurious interest, or engage in child marketing of an addictive product as alleged in the instant *Daniels* case – state law properly applies.

As the *Daniels* decision below emphasizes repeatedly (and essentially relies upon), health and safety is relevant to the ban on minor purchase of tobacco. Both politically, and in terms of public health policy, we do not want minors to ingest a product that will cause their premature death. But that underlying concern, while the sole predicate of the Federal Labeling Act, is not the sole concern of child or consumer advocates. And neither *Lorillard* nor the *Daniels* case below even address another primary concern: The addictive quality of the product. Nicotine is not addictive in the sense that chocolate or fast cars or golf may be addictive. It is physiologically addictive to a degree perhaps unmatched by any substance outside of methamphetamine – beyond the power of most illicit drugs. *See* National Institute on Drug Abuse (NIDA) Reports at http://www.nida.nih.gov/researchreports/nicotine/nicotine.html. The most

recent reports pertinent to the power of addiction and the prevalence and costs of youth addiction in particular include the following studies published within the last ten years by NIDA, and available for review at the web site *supra*:

(a) Art Card: **Nicotine** – An Addictive Drug (Addictive Drug Inventory Number: NIDACRD11).[2]

(b) NIDA InfoFacts: Cigarettes and Other **Nicotine** Products (March 2004), FACT SHEET, Health Professionals; Parents/Caregivers; Prevention Program Planners; Students.[3]

(c) NIDA InfoFacts: Cigarettes and Other **Nicotine** Products (March 2004) Inventory Number: NIF010 1999 NIDA.[4] googlesearch.aspx?q=cache:v3_cpeWHRk4J http://ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx%3FItemID%3D15196+nicotine&btnG=S.

(d) Mind Over Matter: The Brain's Response to **Nicotine** Inventory Number: PHD807 (explains scientifically how **nicotine** affects the entire body).[5]

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[2] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15803.

[3] ncadistore.samhsa.gov/CatalogNIDA/Pub_List.aspx?CID=1&KID=55.

[4] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15196.

[5] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=17678.

(e) NIDA InfoFacts: Cigarettes and Other **Nicotine** Products (March 2004), FACT SHEET, Health Professionals; Parents/Caregivers; Prevention Program Planners; Students.[6]

(f) NIDA Research Report Series: Tobacco Addiction (describes what **nicotine** is, presents current epidemiological research data regarding its use, and reports on the medical consequences of **nicotine** use).[7]

(g) Publications By Drugs of Abuse (Barbiturates, Methadone, Buprenorphine, Methamphetamines. Club Drugs, Nicotine, Cocaine, Nitrous Oxide, Crack Cocaine, Opiates/Narcotics, Depressants, OxyContin, et al.).[8]

(h) National Institute on Drug Abuse, NIDA Research Report Series: Tobacco Addiction.[9]

A mature adult may make a decision to subject himself or herself to future physiologically driven purchases, but such decision with such lifelong purchasing consequences are best not made at the age of 14. And this judgement may drive a defensible state

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[6] ncaistore.samhsa.gov/CatalogNIDA/Pub_List.aspx?CID=1&KID=9.

[7] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15263.

[8] ncadistore.samhsa.gov/CatalogNIDA/Search_Topics.aspx?CID=1.

[9] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15441.

policy without any health and safety implications at all. *Amici* CPIL and CAI respectfully suggest that the adverse health and safety effects are not needed to warrant state restriction of sales to minors. Many examples illustrate market rule distinctions between children and adults. A typical example is the now common prohibition on tattooing minors without parental permission. That restriction is increasingly imposed not primarily because of health concerns, but because they are difficult to remove. Some youth may not be prescient enough to avoid implanting her current boy friend's name. The point is that it is too often a decision made too early and lasting too long. Teen pregnancy reduction is perhaps a more serious example of a similar state interest. The protection of our youth from their own hormonal improvidence is a legitimate state function – it may or may not have health and safety focus – and any expansion of federal territory based on bright line pronouncements that "sales to minors are driven by health and safety concern" is imprudent. Moreover, it appears to be based on a *non sequitur* implication that since health is such an admittedly important factor, it is appropriately (a) expanded beyond its direct domain to foreclose other legitimate societal concerns over children and market sales, and (b) applied to categorically bar the assurance of fair competition across the broad subject matter of tobacco marketing practice, including a gross bar to the pre-eminent safekeepers of fair competition in the nation (state law remedies under UCL's within the several states).

The existence of harmful health impact here appears to mischievously favor industry license as to broader aspects of its marketing and other effects. The implicit logic is: "Yes, there are other reasons for state restriction of sales of this addictive product to minors, but the health hazards are so ominous that we shall deny the existence of any other aspect, and thus demonstrate our sensitivity to its deleterious nature." The result of this dynamic is to impose federal preemption of state consumer protection laws as to any aspect of tobacco sales touched by health issues – with the *Daniels* court finding such health consequence to be pervasively "underlying" all sorts of policies, including the protection of minors. Perversely, a sword of proper condemnation and concern becomes a magic shield of immunity. And that immunity extends beyond the scope of the Federal Labeling Act's intended or actual protection. The fact of a powerful rationale for public regulation does not remove less urgent but still compelling secondary justifications involving other qualities and effects.

Nothing in the *Lorillard* decision of this Court indicates that the statute's reach properly goes beyond its terms and history as discussed above. However, the logic of the court below would extend this Court's *Lorillard* precedent far beyond its carefully considered tether. A failure to correct this erroneous state supreme court interpretation will preclude state fair competition standards quite beyond the health ambit of the required "determined to be hazardous" warning or health and safety representations in

general. The issues of addictive quality (and deliberately enhanced addictive quality) and marketing to children are – individually and together – another issue. It is an issue with some health related implications, but it is not entirely an issue of health given factors of age (maturity) and chemically arranged lifelong purchase compulsion. The *Daniels* case erases state jurisdiction well beyond the health and safety reach of the Federal Labeling Act. *Amici* CPIL and CAI respectfully argue that this child/consumer protection territory is a matter of proper state concern.

To restate *Amici's* point: Assume that the products addressed by the instant *Daniels* case have no adverse health consequences whatever – and that even the label required by the Federal Labeling Act is gratuitous and properly inapplicable. It is relevant that consumers are being sold a product with a physiologically addictive quality, and that a competitor able to enhance that addictive quality will gain an advantage in the marketplace. And youth who can be hooked constitute a vulnerable population for such addiction-based future purchases. *Amici* can find nothing in the legislative history of the Federal Labeling Act at issue addressing sales to minors and addiction danger. The warning has to do with prescribed safety danger warnings to smokers. If one finds preemption of a state unfair competition law that addresses a competitor allegedly marketing to minors and attempting to stimulate demand for such unlawful sales, does the preemption also not lie as to

the underlying age prohibition. Assuming this Court views those under-age prohibitions as within state police power domain, how do we preempt a marketing campaign with the alleged design and effect of undermining that prohibition?

Nothing in the Federal Labeling Act or its legislative history indicates that it extends beyond its stated reach and provides effective immunity for this industry from any and all of the fifty states, their legislatures, and their courts. We can find no nexus between the stated basis for this bar and its reach as formulated in the *Daniels* decision below. The holding that converts a federal statute intended to create a uniform health hazard warning into a blanket bar to state legislatures and courts asked to address tobacco practices far beyond that ambit has uncertain boundaries. It disrespects state prerogative in assuring fair competition, the control of addictive products (whatever the health effects in later years), and the protection of children. There are reasons to control or prohibit sales directed at children quite apart from the health hazard issue.

These are important questions for this Court to address. For if a circumscribed federal statute can be so extended to grant industry supersession over the reach of the sovereign states as they seek to protect their citizens (here, their children) from addictive products and competitive advantage flowing from addiction enhancement and targeted advertising, the precedential implications are disturbing. Those

implications do not square with this Court's consistent pronouncements respecting such sovereignty.

V. Review is Commended by the Importance of the Issue Presented, Its Reach, and Conflict Where this Court's Own Precedent is at Issue

This Court necessarily chooses sparingly in its grants of *certiorari*. Such consideration is traditionally affected by the importance of the questions raised, their reach, and the need for confusion amelioration. All three factors are present in large measure in the *Daniels* petition here presented.

First, even were we to disregard the significant health implications of tobacco use, its physiologically addictive property makes its sale and promotion of special consequence to the public. Critically, the Federal Labeling Act did not address addiction issues at all. They became pre-eminent in the literature and politics of the subject after the rise of the health and safety argument against tobacco use. The addictive attraction of the product for minors (where peer pressure, rebellion and a desire to appear older may affect purchase and use) is historically documented. The typical smoker is addicted prior to reaching the age of 18.[10]

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[10] *See* On the Measurement of Nicotine Dependence in Adolescence: Comparisons of the FTQ and a DSMIVBased Scale, Denise Kandel, Ph.D, Christine Schaffran, MA, Pamela Griesler,

(Continued on following page)

And the incidence of addiction and volume of sales is momentous, involving millions of adult and youth consumers presently afflicted. The size of this industry, its volume, its numbers of customers under compulsion to purchase regardless of health and safety effect is extraordinary within the American economy. This Court cannot avoid judicial notice of the size of this market, or the unusual source of continuing demand for its product. Convenience store sales alone in 2005 passed $9 billion in the United States.[11]

Second, the question here raised is national in scope. Every state has an unfair competition law. These statutes, sometimes called "Little FTC Acts," are the nation's primary mechanism to assure a free, competitive and fair system of commerce – particularly as to issues of advertising and marketing. The Federal Trade Commission itself operates to enforce its consumer protection Section 5 (15 U.S.C. § 45) with limited powers (primarily the issuance of cease and desist orders and trade regulation guides lacking any financial penalty until fully adjudicated). Its statute lacks any private or ancillary enforcement

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Ph.D, Jessica Samuolis, Ph.D, Mark Davies, MPH, and Rosaria Galanti, M.D., Ph.D, JOURNAL OF PEDIATRIC PSYCHOLOGY (June 2005) 30(4): pages 319-332, excerpted at http://whyquit.com/whyquit/LinksAAddiction.html.

[11] *See* the United States Convenience Store Association statistics and web site's (NPN Web), compiling 2004 and 2005 cigarette sales data, at http://npnweb.com/uploads/researchdata/2006/ConvenienceStoreData/0606_ccss.asp.

means. The Commission is the only progenitor of its cases (outside of antitrust matters). *See Holloway v. Bristol-Meyers Corporation*, 485 F.2d 986 (D.C. Cir. 1973).

Much marketplace policing in the United States is accomplished through the unfair competition laws enacted by and enforced within and among the fifty states. These statutes commonly provide for equitable remedies – including restitution and correction – and often for civil penalties or other deterrent impact directly. Moreover, they often provide for enforcement through both private and public action (*see, e.g.*, California Business and Professions Code §§ 17203-17206). Significantly, the *Daniels* precedent here at issue strips not only the private enforcers of this statute from serving as a check on tobacco industry practices, but also eliminates the important enforcement function of public agencies and offices in their enforcement. In California, 58 district attorneys, major city attorneys, the Department of Consumer Affairs, and the State Attorney General are all assigned the task of unfair competition law enforcement (California Business and Professions Code § 17206). That enforcement is coordinated within the state through an Attorney General sponsored system of notice.

All of the mechanisms for state unfair and unlawful competition enforcement are eliminated from tobacco industry reach by the decision below. They are purportedly preempted by three propositions there advanced: (a) the Federal Labeling Act

occupies the field and preempts state unfair competition enforcement where the Act applies, (b) it applies to tobacco health and safety issues, and (c) the product presents such pervasive health danger that this issue underlies all regulation of tobacco – including even sales to minors. Ergo, the *Daniels* logic infers, federal law preempts tobacco industry marketing limitation in broad measure (largely because it is such a harmful product and hence would presumably always raise the Federal Labeling Act exclusivity). It is fair to ask how the Attorney General of California can enforce the existing tobacco Master Settlement Agreement (MSA) to police industry child marketing, as it has been purporting to do in California over the past decade? Those efforts appear to be darkened by the *Daniels* brush. If the *Daniels* class is foreclosed, public prosecutors acting under the aegis of the same state statute would also be precluded from fair competition protection – under the apparent guise that because tobacco involves health and safety issues, it receives a free pass as to the entire range of marketing abuses it may commit.

A more basic question looms behind the *Daniels* decision: If the Federal Labeling Act truly preempts as to tobacco health and safety issues, and if health and safety necessarily and critically "underlie" the state policy against sales to minors (as this case explicitly states), than how do states have the authority to regulate sales to minors at any level? It would appear that any state that categorically lacks the power to address youth marketing would also not

have the right to prosecute a merchant for making a sale to a 16-year-old. We cannot find the logical line between targeted marketing to youth and a sales prohibition, particularly where the latter is buttressed by criminal sanctions that would make state interference more – not less – problematical. Add to this stew the line of cases finding state laws allowing medicinal marijuana to be preempted by federal drug laws, *see Gonzales v. Raich,* 545 U.S. 1 (2005). One can of course distinguish those cases as involving very specific federal criminal prohibitions by precise and enumerated drug description. In contrast, the addictive quality of tobacco, and state child protection interests (separately or in combination) distinguish it from a federal tobacco labeling statute. But once you posit the proposition that *this* is not the bright line, but that it rather is a divisor between targeted marketing to minors (pre-empted) and sales to minors (not pre-empted) – a problem arises.

Third, we have confusion of traditional concern for this Court. As discussed above, the First Circuit's decision in *Good* is contrary to the *Daniels* result on a rather *in extremis* level. For it deals with an issue relatively more confined to health and safety (are light cigarettes more or less hazardous than regulars and nevertheless being marketed deceptively as to health consequence?). That focus contrasts with the dominant issue of *Daniels* – involving immaturity in purchase decisions and addictive impact. The latter extends well beyond health consequences more than the direct health marketing issue of *Good.* So we not

only have conflict between major regions of the country, but we have an apparent irreconcilable conflict as to policy and state prerogative. They cannot both be right.

The importance of the confusion may be accentuated here by the role of this Court's decision in *Lorillard* at the center of the conflict and the *Daniels* court's reliance on that decision as its major authority. Where the conflict is over a prospective issue or over a matter that has not been considered by the U.S. Supreme Court, it may present a theoretical issue of interpretation. But this case presents what must be (by one of these authorities) a *mis*interpretation of an existing and recent decision of some momentous impact. Arguably, the obligation of this Court to secure the consistent and correct application of its own authority may justify higher priority than disagreements over theoretical issues not yet addressed by the Court. Correction of what the Court has already enunciated and intended – and where its pronouncement is being followed erroneously – may be more important than clarifying where there is a present vacuum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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